

NO. 10027

United States

Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

ROSETTA ALICE KELLEY,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the
United States for the Southern District
of California, Central Division.

FILED

APR 14 1942

PAUL P. O'BRIEN,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

WM. FLEET PALMER, Esq.,
United States Attorney,
DANIEL DILLON, Esq.,
Attorney, Department of Justice,
600 U. S. Post Office and Court House
Building,
Los Angeles, California.

For Appellee:

SYLVESTER HOFFMANN, Esq.,
819 Chester Williams Building,
215 West Fifth Street,
Los Angeles, California. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court, Southern District of California, Central Division.

No. 1100-B (Civil)

ROSETTA ALICE KELLEY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT ON UNITED STATES GOVERNMENT INSURANCE CONTRACT.

Plaintiff complains of defendant and alleges:

I.

That plaintiff is a citizen of the United States of America and a resident of the Southern District of California, Central Division, and of the County of San Bernardino therein.

II.

That this action is brought under the War Risk Insurance Act of October 6th, 1917 and the World War Veteran's Act of June 7th, 1924, and amendatory acts, and is based upon a policy of Life Insurance issued under and by virtue of said acts and the laws of the United States of America to Thomas Joseph Kelley, now deceased, by the defendant.

III.

That while Thomas Joseph Kelley was in the armed forces of the United States during the World

War and prior to his discharge therefrom, he applied for and was granted \$10,000.00 of War Risk Term Insurance and paid all the premiums thereon through the month of January, 1919.

IV.

That on or about March 15, 1932, the said Thomas Joseph Kelley, now deceased, applied for and was granted United States Government Insurance in the sum of \$5,000.00, pursuant to Section 310 of the World War Veterans' Act, as amended, and that the de- [2] fendant issued said policy and that by the terms thereof, plaintiff was named as beneficiary in the event of the death of said Thomas Joseph Kelley while the policy was in full force and effect, said policy being No. K-919,427. That plaintiff is informed and believes and on such information and belief alleges that the premiums on said policy were paid promptly when due, through the month of August, 1935, and thereafter, the exact date being unknown to plaintiff but well known to the defendant.

V.

That the defendant has in its possession said policy, and has refused to deliver the same to plaintiff. That plaintiff is informed and believes and on such information and belief alleges that said policy provides by its terms that it is payable to the beneficiary in a lump sum in the event that the said insured died while the policy was in full force and effect, and that, further, by the terms of said policy,

and by virtue of certain "extended insurance benefits", said policy is still in full force and effect unless matured by the death of the insured, and was in full force and effect at the time of his death. That he died in the County of Los Angeles on or about August 10th, 1935.

VI.

That subsequent to the death of the insured, as aforesaid, and prior to on or about October 6th, 1936, the exact date being unknown to plaintiff but well known to defendant, application was made to the defendant for payment of the benefits due plaintiff under the terms of said policy, and that on or about October 6th, 1936, H. L. McCoy, as Director of Insurance, on behalf of the defendant and the Insurance Claims Council of the Veterans' Administration of the United States, denied liability and disagreed with plaintiff; that thereupon plaintiff appealed to the Administrator of Veterans' Affairs, who, on or about January 22nd, 1936, denied said appeal and affirmed all prior decisions, and that a disagreement exists between the plaintiff and the defendant as to her rights to receive the benefits under said policy, in the sum of [3] \$5,000.00, as such beneficiary.

VII.

That during his lifetime, said Thomas Joseph Kelley kept or performed all of the things to be done, kept or performed on his part, under the terms of said policy or contract, and that plaintiff, between August 10th, 1935, and October 6th, 1936,

the exact date being unknown to plaintiff but well known to the defendant, made due proof to the defendant of her right to such benefits and as to the death of the insured, and as otherwise required by law and the terms of said policy.

VIII.

That plaintiff has employed Sylvester Hoffmann, Esq., an attorney and counsellor at law, duly licensed and admitted to practice before this Court and all other Courts in the State of California, to bring and prosecute this action and that a reasonable attorney's fee to be allowed to plaintiff's attorney for his services in this action is 10% of the amount of insurance recovered and to be paid by the defendant out of the payment to be made under any judgment or decree in favor of plaintiff, payable at a rate not exceeding one-tenth of each such payments until paid, in the manner provided by Section 500 of the World War Veterans Act of 1924 as amended.

Wherefore, plaintiff prays judgment as follows:

1. For the sum of \$5,000.00 and such other benefits as she may be entitled to as beneficiary under the aforesaid insurance.

2. Determining and allowing plaintiff's attorney a reasonable attorney's fee in an amount not to exceed ten percent (10%) of the amount recovered, and to be paid by the defendant out of the payments to be made under the judgment or decree and in the manner as provided by law.

3. For such other and further relief as may be just, equitable and proper in the premises.

SYLVESTER HOFFMANN

Attorney for plaintiff [4]

United States of America

Southern District of California

Central Division.—ss.

Rosetta Alice Kelley, being by me first duly sworn, deposes and says that she is the plaintiff in the above entitled action; that she has read the foregoing Complaint on United States Government Insurance Contract and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters she believes is to be true.

ROSETTA ALICE KELLEY

Subscribed and sworn to before me this 23rd day of July, 1940.

[Seal]

JOHN HIB

Notary Public in and for the County of San Bernardino, State of California.

[Endorsed]: Filed Aug. 7, 1940. [5]

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant, the United States of America, by its attorneys, Wm. Fleet Palmer,

United States Attorney for the Southern District of California, Daniel Dillon, Attorney, Department of Justice, and Attilio di Girolamo, Attorney, Department of Justice, and for answer to the complaint filed herein admits, denies, and alleges:

First Defense

I.

Defendant denies the allegations contained in paragraph designated I for want of knowledge or information sufficient to form a belief as to the truth thereof.

II.

Defendant admits the allegations contained in paragraph designated II of the complaint.

III.

Defendant admits the allegations contained in paragraph designated III of the complaint.

IV.

Defendant denies the allegations contained in paragraph designated IV of the complaint except as specifically admitted and alleged in the second defense herein. [6]

V.

Answering the allegations of paragraph designated V of the complaint, defendant admits that it now has possession of the policy of insurance therein referred to, admits that said policy of insurance contained a provision for the payment of the proceeds thereof in one sum to the plaintiff

herein in the event the policy matured while in full force and effect by the death of the insured, admits that the insured, Thomas Joseph Kelley, died on August 10, 1935, but denies all of the remaining allegations of said paragraph.

VI.

Defendant denies the allegations contained in paragraph designated VI of the complaint, but in further answer thereto admits and alleges that on August 26, 1935, the plaintiff herein filed in the Veterans Administration a claim for the payment to her of the proceeds of said policy of insurance; that on August 29, 1935, the Director of Insurance of the Veterans Administration rendered a decision to the effect that the insurance was not payable to the plaintiff because in his application for insurance, *executed* March 15, 1932, Thomas Joseph Kelley withheld information material to the risk and made fraudulent misrepresentations in regard to his health and his consultation with and treatment by physicians and thus denied the claim, so notifying the plaintiff on August 29, 1935 and January 8, 1936; that on July 31, 1936, the plaintiff filed an appeal from said decision to the Administrator of Veterans' Affairs and on September 28, 1936, the Administrator rendered a decision affirming the prior action of the Director of Insurance and denying the claim for insurance benefits, of which action the plaintiff was notified by letter

from the Director of Insurance dated October 6, 1936.

VII.

Defendant denies the allegations contained in paragraph designated VII of the complaint. [7]

VIII.

Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph designated VIII of the complaint but says that in the event of plaintiff's recovery herein, the court may, at its discretion, allow a reasonable attorney's fee subject to the provisions of Section 500, World War Veterans' Act, 1924, as amended.

Second Defense

Further answering herein, defendant says that on March 15, 1932, Thomas Joseph Kelley, not having been protected by yearly renewable term insurance or United States Government life insurance subsequent to the month of January 1919, executed an application for the issuance of United States Government life insurance under the provisions of Section 310, World War Veterans' Act, 1924, as amended, and submitted said application to the Veterans Administration for the issuance of a contract of insurance in the principal amount of \$5,000; that in said application for insurance, Thomas Joseph Kelley represented that he had never applied for Government compensation or

pension, that he was then in good health, that he had never been treated for any disease of the heart or blood vessels or genito-urinary organs, that he had not been ill, contracted any disease, suffered any injury or consulted a physician in regard to his health since the date of his discharge except that he had a hemorrhoidectomy in September 1920; that in said application for insurance the said Thomas Joseph Kelley further represented that he had never had syphilis. Defendant says that, relying upon the representations of Thomas Joseph Kelley in his application for insurance, the Insurance Division of the Veterans Administration, charged with the administration of Government insurance, approved [8] said application for insurance and issued to said Thomas Joseph Kelley a contract of United States Government life insurance in the principal sum of \$5,000, No. K-919,427, and defendant says that the aforesaid representations of Thomas J. Kelley in the said application for insurance were untrue, false and fraudulent in that, contrary to the facts stated in said application, the said Thomas Joseph Kelley had theretofore, on September 3, 1931, filed in the United States Veterans Bureau at Los Angeles, California, his applications for disability compensation and disability allowance representing therein that he then had heart trouble, rheumatism and spinal trouble which had been incurred in 1918 and that he had received treatment by a private physician in September 1930 and March 1931; that pursuant to said applications

for disability compensation and disability allowance, Thomas Joseph Kelley had consulted with and been examined by physicians of the United States Veterans Administration at Los Angeles, California, on October 28, 1931, at which time he had syphilis, manifested by a positive Wassermann, and sortitis; that Thomas Joseph Kelley was then notified of the findings of the Veterans Bureau physicians, Los Angeles, California, and on November 17, 1931, was again notified in writing that he had chronic sortitis. Defendant further says that notwithstanding Thomas Joseph Kelley's representation in his application for insurance that he had not consulted any physicians in regard to his health since the date of his discharge, he had in fact not only consulted physicians of the Veterans Bureau, Los Angeles, California, in regard to his health not more than five months prior to the said application but had also consulted a private physician in regard to his health in September 1930 and March 1931; that, notwithstanding his representation in his application for insurance that he was in good health, the said Thomas Joseph Kelley was not in good health on March 15, 1932, and well knew that he was not then in good health, having theretofore [9] known that he had heart trouble, spinal trouble and rheumatism and having also been informed that he had chronic sortitis. Defendant further says that the said Thomas Joseph Kelley was discharged from the military service of the United States on January 16, 1919, and that in his appli-

cation for insurance he, therefore, falsely and fraudulently represented that he had not consulted a physician in regard to his health since January 16, 1919. Defendant further alleges the facts to be that Thomas Joseph Kelley, on March 15, 1932, well knew that he had theretofore, on September 3, 1931, filed in Los Angeles, California, claims for disability compensation and disability allowance; that he then well knew that he was not then in good health; that he then well knew that he had theretofore consulted physicians in regard to his health since the date of his discharge from service; that, notwithstanding his representations to the contrary, he well knew that he then had syphilis and sortitis; that he misrepresented the facts in regard to the condition of his health, his consultation with and treatment by physicians and *conceal* the facts relating to his filing claims for disability compensation and disability allowance, the state of his health and his consultation with and treatment by physicians, all with the intent to deceive the defendant and thereby procure the issuance of the contract of insurance involved in this action; that if the said Thomas Joseph Kelley had made true statements and a full disclosure of said material facts in his application for insurance, the contract of insurance involved herein would not have been issued, that the said misrepresentations and concealments were not discovered by the Insurance Division of the Veterans Administration until the claim for insur-

ance benefits had been filed in the Veterans Administration by the plaintiff herein.

Wherefore, defendant says that by reason of the false and fraudulent representations and concealments of said Thomas Joseph [10] Kelley in his application for insurance executed on March 15, 1932, plaintiff herein is not entitled to recover under the contract of insurance involved in this action and defendant prays that plaintiff take nothing by her suit.

WM. FLEET PALMER

United States Attorney.

DANIEL DILLON

Attorney, Department of Justice.

ATTILIO DI GIROLAMO

Attorney, Department of Justice.

The defendant hereby serves notice that a jury trial is demanded in the above entitled case. [11]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

United States of America,
Southern District of California—ss.

Eva P. King, being first duly sworn, deposes and says:

That she is a citizen of the United States and a resident of Los Angeles County, California; that her business address is 677 U. S. P. O. and Court

House, Los Angeles, California; that she is over the age of eighteen years, and not a party to the above-entitled action;

That on November 18, 1940 she deposited in the United States Mails in the Post Office at Temple and Main Streets, Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of Answer addressed to Sylvester Hoffmann, Attorney-at-Law, 215 West Fifth Street, Los Angeles, California, Attorney for Plaintiff, at which place there is a delivery service by United States Mail from said post office.

EVA P. KING

Subscribed and sworn to before me, this 18 day of November, 1940.

R. S. ZIMMERMAN,

Clerk, U. S. District Court,

Southern District of California

By J. M. HORN

Deputy.

[Endorsed]: Filed Nov. 18, 1940. [12]

At a stated term, to wit: The February Term A. D. 1941, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 28th day of May in the year of our Lord one thousand nine hundred and forty-one:

Present:

The Honorable J. F. T. O'Connor, District Judge.

[Title of Cause.]

This cause coming before the Court for further jury trial of the issues involved in this cause, at the hour of 10:38 o'clock A. M., Sylvester Hoffman, Esq., appearing as counsel for the plaintiff, Rosetta Alice Kelley, who is present in court; Daniel Dillon, Esq., Assistant U. S. Attorney, appearing as counsel for the Government; and Ben A. Bell being present in court as stenographic reporter of the testimony and the proceedings, and the jury being present, and the Court having ordered that the trial be proceeded with, * * *

At the hour of 3:33 P. M., the jury return into the court room, and all being present as before, including counsel for both sides, and the plaintiff being absent, and the court having reconvened, and counsel having stipulated that the jury is present, the jury are asked if they have agreed upon a verdict, and the jury having stated, through its foreman, that it has so agreed, said verdict is

presented by the foreman of the jury to the Court, read by the clerk, and ordered filed and entered herein, to wit:

* * * * * [13]

[Title of District Court and Cause.]

VERDICT OF THE JURY

We, the jury in the above entitled cause, find in favor of the plaintiff and against the defendant.

Dated: Los Angeles, California, May 28th, 1941.

E. M. GULLICK

Foreman of the Jury.

[Endorsed]: Filed May 28, 1941. [14]

In the District Court of the United States in and for the Southern District of California, Central Division.

No. 1100-O'C—Civil

ROSETTA ALICE KELLEY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above entitled cause came on regularly for trial on the 27th day of May, 1941, before the

Court sitting with a jury, Sylvester Hoffmann, Esq., appearing for the plaintiff and William Fleet Palmer, United States Attorney and Daniel Dillon, Esq., Attorney for Department of Justice appearing for the defendant; and evidence both oral and documentary having been introduced, the cause argued, and the jury instructed by the Court, and the cause submitted to the jury for its verdict, and the jury having thereupon rendered the following verdict: We, the jury in the above entitled cause, find in favor of the plaintiff and against the defendant.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is Ordered, Adjudged and Decreed that Rosetta Alice Kelley, the plaintiff herein, do have and recover from the United States of America, the defendant, the sum of \$5,000.00, lawful money of the United States, payable in one lump sum payment, pursuant to the terms of that certain United States Government Life Insurance Contract or policy No. K 919427; and the Court having found that the sum of \$500.00 is a reasonable fee for Sylvester Hoffmann, Esq., the attorney for the plaintiff,

It Is Further Ordered, Adjudged and Decreed that said Sylvester Hoffmann, Esq., be, and he is hereby allowed, the said sum of \$500.00, as and for his fee in the prosecution of the above [15] entitled action for the plaintiff, to be paid by the United States Veterans' Administration or its successor to said attorney out of the payment to be made to the

plaintiff, her heirs, personal representatives, executors, administrators and assigns, under this judgment.

Dated: this 2nd day of June, 1941.

J. F. T. O'CONNOR

United States District Judge

Approved as to form:

WM. FLEET PALMER

United States Attorney

DANIEL DILLON

Attorney, Department of Justice

Attorneys for defendant.

[Endorsed]: Filed Jun. 2, 1941.

Judgment entered June 2, 1941.

Docketed June 2, 1941, C. O. Book 5, Page 553.

R. S. ZIMMERMAN,

Clerk,

By FRANCIS E. CROSS

Deputy. [16]

[Title of District Court and Cause.]

NOTICE OF MOTION

To: Rosetta Alice Kelley, Plaintiff in the above entitled case, and

To: Sylvester Hoffmann, Attorney-at-Law, 215 West Fifth Street, Los Angeles, California, her attorney:

You and Each of You are hereby notified that at the calling of the Law and Motion Calendar in the Court of the Honorable J. F. T. O'Connor, one of the Judges of the above entitled Court, at his Court Room in the U. S. Post Office and Court House, Los Angeles, California, on the 16th day of June, 1941, at 10:00 o'clock, A. M., or as soon thereafter as counsel may be heard, the defendant by its counsel will move the Court to vacate the jury verdict heretofore rendered in the above entitled cause on May 28, 1941, and will move for a judgment in favor of the defendant notwithstanding the verdict.

Furthermore, in the event of the denial of the motion for a judgment in favor of the defendant notwithstanding the verdict, the defendant will move that the verdict entered herein be vacated and that the defendant be granted a new trial.

Said motion will be based on the following grounds:

I.

That defendant, by its evidence, established without contradiction that material representations in

the insured's application for insurance were known to be untrue by the insured when made, and that [17] this invalidated the policy without further proof of actual conscious design to defraud, and, accordingly, defendant's motion for a directed verdict should have been given by this Court.

II.

That after defendant had by affirmative evidence established the fact that material misrepresentations had been made in the insured's application for insurance, the same being known to be untrue by the insured, that plaintiff did not by substantial credible evidence establish this fact to the contrary, accordingly, the jury's verdict was contrary to the greater weight of the evidence and that if the jury's verdict is allowed to stand the defendant will suffer an injustice thereby.

Dated this 6th day of June, 1941.

WM. FLEET PALMER

United States Attorney.

DANIEL DILLON

Attorney, Department of Justice.

Attorneys for Defendant. [18]

[Title of District Court and Cause.]

MOTION

Comes Now the defendant, the United States of America, by Wm. Fleet Palmer, United States Attorney for the Southern District of California, and Daniel Dillon, Attorney, Department of Justice, and moves the Court that the jury verdict rendered herein on the 28th day of May, 1941, be vacated and that judgment be entered for the defendant notwithstanding the verdict and in accordance with defendant's motion for a directed verdict made at the close of all the evidence.

Furthermore, in the event of the denial of the defendant's motion for judgment notwithstanding the verdict, the defendant moves in the alternative that the verdict be vacated and that the defendant be granted a new trial.

The defendant bases its motion on the following grounds:

I.

That defendant, by its evidence, established without contradiction that material representations in the insured's application for insurance were known to be untrue by the insured when made, and that this invalidated the policy without further proof of actual conscious design to defraud, and, accordingly, defendant's motion for a directed verdict should have been given by this Court.

II.

That after defendant had by affirmative evidence established the fact that material misrepresentations had been made in the insured's [19] application for insurance, the same being known to be untrue by the insured, that plaintiff did not by substantial credible evidence establish this fact to the contrary, accordingly, the jury's verdict was contrary to the greater weight of the evidence and that if the jury's verdict is allowed to stand the defendant will suffer an injustice thereby.

III.

That it was immaterial whether the omission to communicate a material fact by this insured arose from intention, indifference, or mistake, or from it not being present to the mind of the party who should communicate it, that the fact was one which it was material to make known; accordingly, the defendant's motion for a directed verdict at the close of all the evidence should have been sustained.

IV.

That the preponderance of the evidence was in favor of the defendant and the defendant's motion based on that ground at the close of the case should have been granted.

V.

That the verdict of the jury was contrary to the law of the case.

Dated this 6th day of June, 1941.

WM. FLEET PALMER

United States Attorney.

DANIEL DILLON

Attorney, Department of Justice.

[Endorsed]: Filed June 6, 1941. [20]

[Title of District Court and Cause.]

ORDER

The motion of the United States of America to vacate the jury verdict heretofore rendered in the above entitled cause on May 28, 1941, and motion for judgment in favor of defendant notwithstanding the verdict and motion that the defendant be granted a new trial having come on regularly to be heard before the above entitled court on the 16th day of June, 1941, at 10:00 o'clock A. M. of said day and date, the court, after arguments of counsel for the plaintiff and defendant, and after due consideration thereof, hereby denies each and all of said motions made for and on behalf of defendant, United States of America.

Dated at Los Angeles, California this 2nd day of July, A. D. 1941.

J. F. T. O'CONNOR

United States District Judge

[Endorsed]: Filed Jul. 2, 1941. [21]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, defendant above named, by its counsel Wm. Fleet Palmer, United States Attorney for the Southern District of California, and Daniel Dillon, Attorney, Department of Justice, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment in favor of the plaintiff entered in the above entitled cause on June 2, 1941.

WM. FLEET PALMER

United States Attorney.

DANIEL DILLON

Attorney, Department of Justice.

Attorneys for Defendant.

[Endorsed]: Filed Sep. 30, 1941 and copy mailed to Atty. for Plf.

R. S. ZIMMERMAN

Clerk.

By EDMUND L. SMITH,

Deputy. [22]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE THE RECORD ON APPEAL AND TO DOCKET THE CAUSE.

Good cause appearing therefor,

It Is Hereby Ordered that the time within which to file the record on appeal and docket the above-

entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same hereby is, extended to and including the 29th day of December, 1941.

Dated this 5th day of November, 1941.

J. F. T. O'CONNOR

United States District Judge

[Endorsed]: Filed Nov. 5, 1941. [23]

[Title of District Court and Cause.]

STIPULATION AND ORDER FOR THE
TRANSMITTING OF ALL EXHIBITS IN-
TRODUCED AT THE TRIAL TO THE
CIRCUIT COURT OF APPEALS.

(Rule 75(i)).

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel, that all of the exhibits introduced at the trial of the above-entitled cause may be sent to the Circuit Court of Appeals for the Ninth Circuit, pursuant to Rule 75(i) Rules of Civil Procedure for the District Courts of the United States, and that the Court may make such order for the safekeeping, transportation and return thereof as it deems proper.

Dated this 16th day of January, 1942.

WM. FLEET PALMER

United States Attorney.

DANIEL DILLON

Attorney, Department of Justice.

Attorneys for Defendant.

SYLVESTER HOFFMANN

Attorney for Plaintiff.

It Is So Ordered this 16 day of Jan. 1942.

J. F. T. O'CONNOR

United States District Judge.

[Endorsed]: Filed Jan. 16, 1942. [24]

[Title of District Court and Cause.]

STIPULATION AS TO THE
RECORD ON APPEAL

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel, that the following hereinafter enumerated parts of the record, proceedings, and evidence be included in and shall constitute the record on appeal herein, pursuant to Rule 75(f) of the Rules of Civil Procedure for the District Courts of the United States:

1. Complaint
2. Answer
3. Minute Order directing filing of Jury Verdict
4. Judgment
5. Defendant's Notice of Motion and Motion for Judgment Notwithstanding the Verdict

6. Minute Order denying defendant's Motion for Judgment Notwithstanding the Verdict

7. Reporter's complete transcript of all proceedings and all exhibits introduced in evidence at the trial including deposition on behalf of defendant of Richard B. Posey. [25]

8. Notice of Appeal

9. Order extending time to December 29, 1941, to file the record on appeal and to docket the cause.

10. Order extending time to January 29, 1942, to file the record on appeal and to docket the cause, signed by Albert Lee Stephens, Judge, United States Circuit Court of Appeals, for the Ninth Circuit.

11. Stipulation and order for transmitting all exhibits

12. This stipulation designating the contents of the record on appeal

13. Certificate of Clerk authenticating the record.

WM. FLEET PALMER

United States Attorney.

DANIEL DILLON

Attorney, Department of Justice.

Attorneys for Defendant.

SYLVESTER HOFFMANN

Attorney for Plaintiff.

[Endorsed]: Filed Jan. 16, 1942. [26]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 26 inclusive contain full, true and correct copies of Complaint; Answer to Complaint; Minutes and Order on Return of Verdict; Verdict; Judgment; Notice of Motion and Motion for Judgment Notwithstanding the Verdict or in the Alternative for New Trial; Order Denying Motions; Notice of Appeal; Order Extending Time to Docket Appeal; Stipulation and Order for Transmittal of Original Exhibits; Stipulation Designating Contents of Record on Appeal, which together with the Reporter's Transcript of Testimony and Proceedings, Exhibits and Deposition transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of the said District Court this 21st day of January, A. D. 1942.

[Seal]

R. S. ZIMMERMAN,

Clerk

By EDMUND L. SMITH,

Deputy.

[Title of District Court and Cause.]

TESTIMONY

Appearances:

For the Plaintiff:

SYLVESTER HOFFMAN, Esq.,
819 Chester Williams Building,
Los Angeles, California.

For the Defendant:

WM. FLEET PALMER,
United States Attorney; and
DANIEL DILLON,
Attorney
Department of Justice. [1*]

Los Angeles, California

Tuesday, May 27, 1941—10:00 o'clock A. M.

The Court: Rosetta Kelley vs. United States,
for jury trial.

Mr. Hoffman: Ready for Plaintiff.

Mr. Dillon: Government is ready, your Honor.

The Court: Very well. Call the jury.

(Whereupon a jury was impaneled to try the case.)

Mr. Hoffman: Plaintiff asks that we may amend the complaint. The last line of page 1, Paragraph IV, your Honor, starts out with the figures "510." The last word before that in the line above says "Section 510." That should be "310," and counsel has no objection to such an amendment. The fact is, that is the section of

*Page numbering appearing at top of page of original certified Reporter's Transcript.

the statute that authorizes the policy to be issued.

I ask the Government, is it stipulated that Rosetta Alice Kelley, the Plaintiff, was a citizen of the United States in the Southern District of California, Central Division, County of San Bernardino, on August 7, 1940 at the time the complaint was filed.

Mr. Dillon: So stipulated.

Mr. Hoffman: And, your Honor, it is admitted by the pleadings that Thomas Joseph Kelley was in the armed forces of the United States during the World War and had applied for [2] and was granted War Risk insurance.

The Court: That is admitted by the answer. That is Paragraph II.

Mr. Hoffman: Paragraphs II and III are both admitted. Therefore, under Section 310 of the World War Veterans Act Mr. Kelley was entitled to the Government insurance; and it will be stipulated, will it not, Mr. Dillon, that effective the first day of March, 1932 a United States Government 23-year endowment policy No. K919427 in the face value or amount of \$5,000 was issued to Thomas Joseph Kelley upon his application therefor in writing.

The Court: Where is that allegation?

Mr. Hoffman: Paragraph IV, your Honor.

The Court: On page 2?

Mr. Hoffman: Beginning on page 1. Do you admit that such a policy was issued?

Mr. Dillon: So stipulated.

Mr. Hoffman: I now offer in evidence, your Honor, the policy, with the exception of a certain rubber stamp that was placed on the top of the policy and which was placed there subsequent to its delivery to the Government by Mrs. Kelley.

The Court: It will be admitted in evidence as Plaintiff's Exhibit 1.

Mr. Hoffman: It is also admitted, your Honor, by the pleadings that Mr. Kelley died August 10, 1935. That is so [3] stipulated.

Mr. Dillon: So stipulated.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 1.)

PLAINTIFF'S EXHIBIT No. 1

Age of Insured—39

Monthly	\$15.05
Quarterly	45.00
Semiannual	89.65
Annual	177.80

Amount of Insurance.

The United States of America
 Hereby Grants Insurance
 of Five Thousand, \$5,000 Dollars
 to .

Insured.

Thomas Joseph Kelley (the Insured).

Premium.

This insurance is granted in consideration of and subject to the terms and conditions hereinafter set forth, and in further consideration of the payment of the monthly premium of \$15.05, due and payable on the day this policy takes effect and on the first day of each succeeding month during the lifetime of the Insured, until premiums for twenty three full years shall have been paid on this policy. Receipt of the first premium is hereby acknowledged.

Endowment to Insured.

This insurance is payable to the Insured in one sum of \$5,000 on the first day of March Nineteen Hundred and Fifty Five (the end of the Endowment Period), if the Insured be then living and the policy in force, and if no monthly installments

on account of total permanent disability have been paid as hereinafter provided.

Mode of Payment at Death or Disability.

This insurance is payable in monthly installments of \$28.75 (hereinafter called the monthly installment) in the event of the total permanent disability of the Insured or of his death before the end of the Endowment Period, unless one of the Optional Settlements is selected as hereinafter provided, then, in the event of the death of the Insured before the end of the Endowment Period, this insurance is payable in accordance with the Optional Settlement so selected.

Beneficiary.

This insurance, subject to the beneficiary provisions hereof, is payable to Rosetta Alice Kelley, his wife, hereinafter called the beneficiary, in one sum.

Disability Benefits to Insured.

Upon due proof of the total permanent disability of the Insured before the end of the Endowment Period and while this policy is in force, the monthly installments shall, except as hereinafter provided, be payable to the Insured and continue to be so payable during total permanent disability so long as he lives, and payment of all premiums due after receipt of such proof during total permanent disability shall be waived.

Death Benefits to Beneficiary.

Upon due proof of the death of the Insured before the end of the Endowment Period and while this policy is in force, the monthly installments, without interest, which have accrued since the death of the Insured, the first installment being due on the date of the death of the Insured, shall be paid to the beneficiary designated, and thereafter the payment of the monthly installments shall continue to be so payable until two hundred and forty installments in all, including any paid to the Insured during his lifetime on account of total permanent disability, shall have been paid; but if two hundred and forty or more installments shall have been paid to the Insured on account of total permanent disability, no death benefit shall be payable. If Optional Settlement 1, 2, or 3 has been selected, payment shall be made accordingly, subject to deduction on account of disability payments.

Place of Payment.

All payments under this policy shall be payable at the United States Treasury in the City of Washington, District of Columbia.

Dividends.

This insurance shall participate in dividends from gains and savings.

Conditions.

The conditions, benefits, and privileges recited on the succeeding pages hereof constitute a part of this contract.

This policy takes effect on the first day of March,
Nineteen Hundred and Thirty Two.

FRANK T. HINES

Director

Countersigned at Washington, D. C.

Examined.

S. J. WALLS

Registrar

[Stamped across face]: Policy Canceled. Do not
remove from folder. By [Illegible]. Date 9/14/38.

Conditions, Benefits, and Privileges.

Payment of Premiums.

1. Premiums are due and payable on the first day of each calendar month in advance in legal tender of the United States of America to the Treasurer of the United States in the City of Washington, District of Columbia.

Premiums may be paid annually, semiannually, or quarterly, in advance, in which case the premium payable will be the sum of the monthly premiums for the period discounted at three and one-half per centum per annum. The discounted premiums for these periods are stated on the first page hereof. At maturity by death or otherwise, the discounted value at three and one-half per centum per annum of the premiums paid in advance beyond the current calendar month shall be refunded to the Insured, if living, otherwise to the beneficiary.

If any premium be not paid when due, this policy shall cease and become void except as hereinafter provided.

Grace for Payment of Premiums.

2. For the payment of any premium under this policy, a grace of thirty-one days without interest will be allowed, during which time the policy will remain in force; but if the policy shall become a claim within the grace period, the unpaid premiums shall be deducted from the amount of insurance payable.

Reinstatement.

3. This policy, if it has not been surrendered for a cash-surrender value, may be reinstated at any time after lapse upon evidence of the insurability of the Insured satisfactory to the Bureau of War Risk Insurance, and upon the payment of all premiums in arrears, with interest from their several due dates at the rate of five per centum per annum, and the payment or reinstatement of any indebtedness which existed at the time of such default, with policy loan interest. However, if such indebtedness with interest would exceed the reserve of this policy at the time of application for reinstatement of said policy, then the amount of such excess shall be paid by the Insured as a condition of the reinstatement of indebtedness and of this policy.

Dividends.

4. This policy shall participate in and receive such dividends from gains and savings as may be determined by the Director of the Bureau of War Risk Insurance with the approval of the Secretary of the Treasury. Any dividends so apportioned may be taken in cash, and if not so taken, shall be left on deposit to accumulate at such rate of interest as the Secretary of the Treasury may determine, but at a rate never less than three and one-half per centum compounded and credited annually, and payable, if not previously withdrawn, at the maturity of this policy to the person entitled to its proceeds.

Cash Surrender and Loan Provisions.

5. Cash-surrender value, paid-up insurance, extended insurance, and policy-loan provisions as follows shall be effective only after premiums for twelve full months have been paid—all values, reserves, and net single premiums being based on the American Experience Table of Mortality, with interest at three and one-half per centum per annum:

Cash Surrender Value.

(a) Upon written request therefor by the Insured made while this policy is in force or not later than three calendar months after the due date of the premium in default, and upon complete surrender of this policy with all claims thereunder, the United States will pay to the Insured the cash-surrender value hereof. The said cash-surrender

value at the end of any policy year for which premiums have been paid in full, if no installments on account of total permanent disability have been paid, shall be the reserve, together with any dividend accumulations left on deposit, less any indebtedness under this policy. For each month within any policy year, for which month the premium has been paid, the reserve at the end of the preceding policy year shall be increased by one-twelfth of the increase in reserve for the current policy year.

Paid-Up Insurance.

(b) If the policy has not been surrendered for a cash-surrender value, upon default in payment of premium and upon written request of the Insured and complete surrender of this policy with all claims thereunder within three calendar months after the due date of the premium, the Bureau of War Risk Insurance will issue paid-up insurance for such amount, payable in one sum at death before the end of the Endowment Period, or at the end of the Endowment Period, as the then cash-surrender value will purchase when applied as a net single premium at the attained age of the Insured. The paid-up insurance shall be with right to total permanent disability benefits and with right to dividends. The monthly installment payable upon due proof of total permanent disability of the Insured under such paid-up insurance shall be a sum that bears the same proportion to the monthly installment as the amount of the paid-up policy bears to the commuted

value of two hundred and forty monthly installments. The Insured may at any time surrender the paid-up policy for its cash-surrender value, or obtain a loan on such paid-up insurance provided no payments have been made on account of total permanent disability.

Extended Insurance.

(c) Upon default in payment of premium and the expiration of the grace period, if the policy has not been surrendered for a cash value or for paid-up insurance, this policy shall be extended automatically as Term Insurance payable in monthly installments for such time from the due date of the premium unpaid as the cash-surrender value will purchase when applied as a net single premium at the attained age of the Insured. The extended insurance shall be with right to total permanent disability benefits and with right to dividends payable in cash only. The number of the monthly installments will in any event be the same as may then be payable hereunder. If there is no indebtedness, the amount of the monthly installment or amount of insurance payable will be the same as may then be payable hereunder excluding dividend accumulations; and if there is an indebtedness, the amount of the monthly installment or amount of insurance payable hereunder shall be reduced in the proportion which the indebtedness bears to the commuted value of the monthly installments payable hereunder, excluding dividend accumulations—said commuted value being determined upon the basis of interest at three and one-half per

centum per annum. If the cash-surrender value shall be more than enough to purchase extended insurance to the end of the Endowment Period, the excess shall be used to purchase Pure Endowment, payable in one sum at the end of the Endowment Period if the Insured is then living. The extended insurance shall not have a loan value, but shall have a cash value.

Policy Loans.

(d) At any time after this policy shall have been in force for one year, and before default in payment of any subsequent premium, and upon execution of a loan agreement, the United States will lend to the Insured on the sole security of this policy any amount which together with any existing indebtedness shall not exceed ninety-four per centum of the cash-surrender value of an insurance without indebtedness. The sum advanced shall bear interest at a rate not exceeding six per centum per annum, the interest being payable annually, and at any time before default in payment of premium may be repaid in full or in amounts of Five Dollars or any multiple thereof. Failure to pay either the amount of the loan or the interest thereon shall not avoid this policy unless the total indebtedness shall equal or exceed the cash-surrender value of an insurance without indebtedness. When the amount of the indebtedness equals or exceeds the cash-surrender value of an insurance without indebtedness this policy shall cease and become void.

TABLE OF GUARANTEED SURRENDER VALUES.

End of Policy Year.	Cash-Surrender Value for Each \$1,000 of Insurance. (Full reserve of policy.)	Paid-up Insurance with Disability Benefits for Each \$1,000 of Insurance.	Extended Insurance with Disability Benefits.		
			Years.	Days.	Pure Endowment.
1	\$ 27.29	\$ 52.02	2	346	.....
2	55.61	103.28	6	4	.....
3	85.01	153.78	9	9	.....
4	115.54	203.51	11	290	.....
5	147.23	252.44	14	85	.....
6	180.12	300.55	16	128	.....
7	214.27	347.85	16	.....	\$ 66.72
8	249.70	394.28	15	.....	148.87
9	286.50	439.90	14	.....	227.38
10	324.69	484.64	13	.....	302.30
11	364.34	528.53	12	.....	373.80
12	405.51	571.58	11	.....	441.94
13	448.30	613.80	10	.....	506.91
14	492.80	655.21	9	.....	568.76
15	539.14	695.88	8	.....	627.59
16	587.44	735.80	7	.....	683.50
17	637.90	775.06	6	.....	736.59
18	690.68	813.68	5	.....	786.91
19	746.05	851.76	4	.....	834.58
20	804.20	889.36	3	.....	879.65
25	.....	.....	.....	.....	.....
30	.....	.....	.....	.....	.....

The above values are based on an insurance of \$1,000 without indebtedness, and with no dividends standing to the credit of the policy, and no installments having been paid on account of total permanent disability. If this policy provides for a larger amount of insurance than \$1,000, the cash-surrender values, loan values, and paid-up insurance values will be increased proportionately. The periods of extended insurance as given in the above table are

the same irrespective of the amount of the insurance, but the amount of Pure Endowment is proportionate to the amount of insurance.

Indebtedness at Maturity of Policy.

6. At the maturity of this policy by death or disability, any indebtedness, unless paid off in cash, shall be liquidated by reducing the monthly installment in the proportion which the indebtedness bears to the commuted value of the monthly installments, as may then be payable hereunder, excluding dividend accumulations. If the policy shall mature as an Endowment, or be payable in one sum at death, any indebtedness shall be deducted from the amount payable under the policy.

Incontestability.

7. This policy shall be incontestable from the date it takes effect, except for nonpayment of premiums, and it is issued free of restrictions as to travel, residence, occupation, or military or naval service, except that the discharge or dismissal of the Insured from the military or naval forces of the United States on the ground that he is an alien enemy, conscientious objector, or a deserter, or as guilty of mutiny, treason, spying, or any offense involving moral turpitude, or willful and persistent misconduct shall terminate this insurance and bar all rights thereunder.

Incontestability Provision as Amended.

This policy shall be incontestable from the date of issuance, reinstatement, or conversion, except for fraud, non-payment of premiums, or on the ground that the applicant was not a member of the military or naval forces of the United States, and the policy is issued free of restrictions as to travel, residence, occupation, or military or naval service. However, no insurance shall be payable for death inflicted as a lawful punishment for crime or military offense, except when inflicted by the enemy: Provided, That the cash value hereof less any indebtedness on the date of such death shall be paid to the designated beneficiary if living, or if there be no designated beneficiary alive at the death of the Insured, the said value shall be paid to the estate of the Insured.

Misstatement of Age.

8. If the age of the Insured has been understated, the amount of the insurance payable under the policy shall be such exact amount as the premium paid would have purchased at the correct age; if overstated, the excess of premiums paid shall be refunded without interest. Guaranteed surrender and loan values will be modified accordingly. The age of the Insured will be admitted by the Bureau of War Risk Insurance at any time upon satisfactory proof.

Total Permanent Disability.

9. Total permanent disability as referred to herein is any impairment of mind or body which

continuously renders it impossible for the disabled person to follow any substantially gainful occupation and which is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. The total permanent disability benefits may relate back to a date not exceeding six months prior to receipt of due proof of such total permanent disability, and any premiums becoming due after the date of such disability and within such six months, if paid, shall be refunded without interest. Without prejudice to any other cause of disability, it is agreed that the irrecoverable loss of the sight of both eyes, or the loss of both hands, or the loss of both feet, or the loss of one hand and one foot, shall be considered as total permanent disability within the meaning of this contract; and monthly installments for any of these specifically enumerated causes of total permanent disability shall accrue from the date of such total permanent disability, and any premiums becoming due after such disability, if paid, shall be refunded without interest. If there is a loan under this policy, then payments on account of total permanent disability shall be adjusted accordingly.

If one or more monthly installments be paid on account of total permanent disability, the Insured may at the end of the Endowment Period surrender this contract for the commuted value of the installments (two hundred and forty less the number paid) less any indebtedness.

Recovery from Disability.

Notwithstanding proof of total permanent disability may have been accepted as satisfactory, the Insured shall at any time, on demand, furnish proof satisfactory to the Bureau of War Risk Insurance of the continuance of such total permanent disability, and if the Insured shall fail to furnish such proof, all payments of monthly installments on account of such disability hereunder shall cease, and all premiums thereafter falling due shall be payable in conformity with this policy. Thereafter the premium to be paid, and the cash-surrender values, paid-up insurance values, and loan values shall be reduced so that the resulting premium and values shall bear the same proportion to the premium and values, respectively, specified hereon, that the commuted value of the installments (two hundred and forty less the number paid) bears to the commuted value of two hundred and forty installments. The extended-insurance values shall be modified accordingly. The amount payable at the end of the Endowment Period shall be the commuted value of the installments (two hundred and forty less the number paid) less any indebtedness.

Total Permanent Disability Benefits Under Paid-Up Insurance

If one or more monthly installments be paid on account of total permanent disability incurred under a paid-up insurance, then there shall be paid upon the surrender of this policy at the death of the

Insured before the end of the Endowment Period or at the end of the Endowment Period a sum equal to the difference between the amount of such paid-up insurance and the difference between the commuted value of two hundred and forty reduced installments and the commuted value of the reduced installments (two hundred and forty less the number paid).

Total Permanent Disability Benefits During Period of Extended Insurance.

In case total permanent disability occurs during the period of extended insurance and payments are made on account of such disability and recovery from such disability also takes place, then, (a) if the recovery takes place before the end of the period of extended insurance, the insurance and Pure Endowment, if any, shall be reduced accordingly, and the insurance, as reduced, shall be continued in force until the end of such period; (b) if the recovery takes place after the end of the period of extended insurance but before the end of the Endowment Period, all rights and claims hereunder shall cease.

In case the Insured is totally and permanently disabled during the period of extended insurance and dies, then, (a) if the Insured dies before the end of the period of extended insurance, there shall be paid the remaining unpaid monthly installments payable and applicable as they come due, unless a different mode of payment has been elected; (b) if

the Insured dies after the end of the period of extended insurance but before the end of the Endowment Period, no death benefits will be payable.

If one or more monthly installments be paid on account of total permanent disability incurred during the period of extended insurance, the amount of the Pure Endowment payable to the Insured on the surrender of this contract at the end of the Endowment Period will be the same sum as may be payable hereunder less the difference between the commuted value of two hundred and forty monthly installments and the commuted value of the installments (two hundred and forty less the number paid).

Assignment.

10. The proceeds of this policy shall not be assignable, except that any person to whom this insurance shall be payable may assign his interest in this insurance to any other beneficiary within the class permitted by the War Risk Insurance Act or any amendment or supplement thereto. No such assignment of this policy shall be binding upon the United States unless in writing and until filed in the Bureau of War Risk Insurance, Washington, D. C. The United States assumes no responsibility for the validity of any assignment. The proceeds of this policy shall not be subject to the claims of creditors of the Insured or creditors of any beneficiary to whom the proceeds may be awarded, except claims

of the United States arising under the War Risk Insurance Act.

Exempt from Taxation.

11. The proceeds of this policy are exempt from all taxation.

Beneficiary.

12. The Insured shall have the right at any time, and from time to time, and without the consent or knowledge of the beneficiary, to change the beneficiary under this policy within the class permitted by the War Risk Insurance Act or any amendment or supplement thereto. Every change of beneficiary must be made by notice, signed by the Insured, to the Bureau of War Risk Insurance at its office in Washington, D. C. (accompanied by the policy for an indorsement of the change thereon by the said Bureau), and shall not take effect unless such change is indorsed on the policy. After such indorsement the change shall be deemed to have been made as of the date the Insured signed said written notice of change whether the Insured be living at the time of said indorsement or not; provided, however, that any payment made to a beneficiary of record before notice of change of beneficiary has been received and recorded by said Bureau shall not be made again to the changed beneficiary. The Insured may also exercise any right or privilege given under the provisions of this policy without the consent of the beneficiary. An original designation of a beneficiary

may be made by last will and testament, but no change of beneficiary may be made by last will and testament.

If no beneficiary within the permitted class be designated by the Insured, either in his lifetime or by his last will and testament, or if the designated beneficiary does not survive the Insured, then there shall be paid to the Estate of the Insured the remaining unpaid monthly installments payable and applicable as they come due, unless otherwise elected.

If the designated beneficiary survives the Insured and dies before receiving all the installments payable and applicable, then there shall be paid to the Estate of such beneficiary the remaining unpaid monthly installments payable and applicable as they come due unless otherwise elected.

Change to Other Forms.

13. At any time within five years from the effective date hereof upon complete surrender while in force, this policy may be exchanged, without medical examination, for a policy of the same amount, bearing the same date and based on the same age, on any plan issued by the Bureau of War Risk Insurance at a higher rate of premium, upon payment of the difference between the reserve on the new policy and the reserve on this policy.

Optional Settlement.

14. (a) At the date of the maturity of the Endowment, instead of receiving payment in one sum the Insured may elect to receive payments in

monthly installments for thirty-six months or not more than two hundred and forty months. Should the Insured die before receiving all of such monthly installments, the commuted value of the remaining unpaid monthly installments shall be payable to the estate of the Insured.

(b) The Insured may select one of the Optional Settlements set forth below, but notice of the selection shall not be valid unless and until it is recorded in the Bureau of War Risk Insurance. The Insured may revoke his selection of the Optional Settlement but the revocation shall not be valid unless and until it is recorded in the Bureau of War Risk Insurance. If the Insured does not select one of said Optional Settlements, then he shall be deemed to have made no election, and the insurance shall be payable in two hundred and forty monthly installments, unless an election under Option 2 or Option 3 is made by the beneficiary.

If the Insured has not made an optional selection, a designated beneficiary or beneficiaries, at the maturity of this policy by death, may select settlement under Options 2 or 3 as set forth below, but the selection shall not be valid unless and until it is recorded in the Bureau of War Risk Insurance. If the Insured has made an optional selection, a designated beneficiary, at the maturity of this policy by death, may elect to receive such insurance in installments spread over a greater period of time than that selected by the Insured.

Settlement under one of these options shall be considered full and complete settlement of all liability under this contract.

The values shown in the following options are based on an insurance of \$1,000 without indebtedness. If there is indebtedness under this policy, or the Insured has received any payments on account of total permanent disability, the values will be decreased accordingly. If this policy provides for a larger amount of insurance than \$1,000, the values will be increased proportionately.

Optional Settlements in Lieu of Monthly Installments of \$5.75 Payable on the Death of the Insured Under the Terms of This Policy, Subject to the Beneficiary Provisions Hereof.

Option 1.

Insurance Payable in One Sum.—Settlement under this option will be made only when selected by the Insured during his lifetime or by his last will and testament. When such selection has been made, \$1,000 will be payable in one sum at the maturity of this policy by death.

Option 2.

Insurance Payable in Elected Installments.—The installments noted below will be payable for an agreed number of months (not less than thirty-six) to the designated beneficiary, but if such beneficiary

dies before the agreed number of monthly installments have been paid, the remaining unpaid monthly installments will be payable in accordance with the beneficiary provisions hereof.

Number of Monthly Installments	Amount of Each Monthly Installment
36	\$29.19
48	22.27
60	18.12
72	15.35
84	13.38
96	11.90
108	10.75
120	9.83
132	9.09
144	8.46
156	7.94
168	7.49
180	7.10
192	6.76
204	6.47
216	6.20
228	5.97
240	5.75

Option 3.

Insurance Payable in Installments Throughout Life.—The installments noted below will be payable throughout the lifetime of the designated beneficiary, but if such designated beneficiary dies before two hundred and forty such installments have been paid, the remaining unpaid monthly installments

will be payable in accordance with the beneficiary provisions hereof.

Age of Beneficiary at Time of Death of Insured	Amount of Each Monthly Installment
10	\$3.67
15	3.75
20	3.84
25	3.96
30	4.11
35	4.30
40	4.52
45	4.79
50	5.07
55	5.35
60	5.56
65	5.70
70	5.75
75	5.75

Amounts of Monthly Installments for Other Ages
Will Be Furnished Upon Request.

Authority.

This insurance is granted under and subject to the provisions of the War Risk Insurance Act and amendments and supplements thereto. No person, except the Director of the Bureau of War Risk Insurance, under the direction of the Secretary of the Treasury, nor any other person unless authorized by the Secretary of the Treasury, may waive forfeitures, or make, modify, or discharge contracts, or extend the time for paying a premium, or bind

the United States by making any promise respecting any benefits hereunder.

[Rubber stamp]: This policy is issued under the [illegible] of and subject to [illegible] World War Veteran Act, 1921 as amended.

Frank T. Hines

The United States of America
GOVERNMENT LIFE INSURANCE

Policy No. K919427

Amount \$5,000

Name

Thomas Joseph Kelley

Notice

It is not necessary for the Insured or the Beneficiary to employ the agency of any person, firm, or corporation in collecting the insurance under this policy, or in receiving any of its benefits. Time and expense will be saved by writing direct to the Bureau of War Risk Insurance, Washington, D. C.

23-Year Endowment Policy

[Endorsed]: Plf. Exhibit No. 1. Filed 5/27/41.
By Cross, Deputy Clerk.

Mr. Hoffman: Will it also be stipulated that the policy provided by its terms for payment of premiums of \$15.05 each and every month, and that all the premiums were paid at the rate of \$15.05 each and every month to and including the premium due August 1, 1935; and that with the payment of that

premium that policy was kept in effect until 30 days after September 1, 1935. Is that correct, Mr. Dillon?

Mr. Dillon: So stipulated.

Mr. Hoffman: And it was in effect by the payment of premiums at the time of the death of the insured, Thomas Joseph Kelly.

Mr. Dillon: So stipulated, unless the defense of the Government is sustained.

Mr. Hoffman: Will it also be stipulated that within the time allowed by law the Plaintiff, Mrs. Kelley, made a demand upon the Government for payment of the insurance, and they have denied her claim and disagreed with her, and that a disagreement exists.

Mr. Dillon: I think you better give the details rather than a general statement.

Mr. Hoffman: Would you admit, then, that the allegations of Paragraph VI of the complaint are true, that subse- [4] quent to the death of the insured, as aforesaid, and prior to on or about October 6, 1936, application was made to the Defendant for payment of benefits due the Plaintiff under the terms of the policy; and that on or about October 6, 1936 H. L. McCoy, Director of Insurance, on behalf of the Defendant and the Insurance Claims Council of the Veterans' Administration of the United States, denied liability and disagreed with the Plaintiff; that thereupon Plaintiff appealed to the Administrator of Veterans' Affairs, who, on or

about January 22, 1936, denied said appeal and affirmed all prior decisions, and that a disagreement exists between the Plaintiff and the Defendant as to her rights to receive the benefits under said policy as such beneficiary; and that the Director of Insurance and the Administrator of Veterans' Affairs advised the Plaintiff of their action.

Mr. Dillon: I still say it would be much better to put the specific dates in there.

Mr. Hoffman: Have you got them? What was the date of the demand?

Mr. Dillon: It is stipulated and agreed that claim for insurance benefits on the policy herein sued upon was received by the Veterans' Administration August 26, 1935. Same was denied August 29, 1935. Appeal from this decision was taken, and was received by the Veterans Administration on July 3, 1936. On September 28, 1936 the Administrator of Veterans' Affairs approved the decision and in a letter under [5] date of August 6, 1936 beneficiary represented was so informed.

Mr. Hoffman: The action, your Honor, was filed August 7, 1940 within the time allowed by law.

Mr. Dillon: So stipulated.

Mr. Hoffman: I desire to read, your Honor, parts of Plaintiff's Exhibit 1 for identification.

The Court: That is in evidence.

Mr. Hoffman: I am sorry, your Honor; Exhibit 1.

(Reading Exhibit.)

Mr. Hoffman: Will it also be stipulated, Mr. Dillon, that no part of the premiums paid by Mr.

Kelley have been repaid to his widow, the beneficiary?

Mr. Dillon: So stipulated.

Mr. Hoffman: Plaintiff rests, your Honor.

The Court: Proceed.

Mr. Dillon: May I make an opening statement, if your Honor please?

The Court: Yes.

OPENING STATEMENT ON BEHALF OF THE GOVERNMENT

Mr. Dillon: May I have this marked for the purpose of identification as Government's Exhibit?

The Clerk: Government's Exhibit A for identification.

(The document referred to was marked Government's Exhibit A for identification.)

Mr. Dillon: Government at this time introduces into [6] evidence Government's Exhibit A. Will counsel admit that the signature of Mr. Kelley attached thereto is his signature?

Mr. Hoffman: Yes; we will stipulate that Mr. Kelley signed the document marked Exhibit A for identification.

The Court: Is it offered now in evidence?

Mr. Dillon: Yes, your Honor.

The Court: Admitted.

(The document referred to was received in evidence and marked Government's Exhibit A.)

UNITED STATES VETERANS BUREAU
Insurance Division
Form 739—Rev. Oct. 1923

APPLICATION FOR UNITED STATES GOVERNMENT LIFE INSURANCE

IN ACCORDANCE WITH THE PROVISIONS OF THE WORLD WAR VETERANS' ACT, 1924 AS AMENDED, AND BUREAU REGULATIONS

(BEFORE FILLING OUT THIS APPLICATION, READ INSTRUCTIONS ON BACK PAGE)

1	MY NAME IN FULL: (Please print or type)		First	Middle	Last name
	Thomas Joseph				Kelley
2	(a) RESIDENCE: Number		Street or rural route		County, city, town, or post office
	1172 Western Ave		San Bernardino California		State
	(b) MAIL PREMIUM NOTICES TO:		San Bernardino Calif.		
3	I WAS BORN AT	City, town, or post office	State	Day of month	Month
	Cryetal Lake	Colorado	20th	Sept	189
					Age nearest birthday
					39 Yrs
4	Did you serve in the military or naval forces of the United States in the course of the World War (April 6, 1917, to July 2, 1921)? (Answer "Yes" or "No")				
	Yes				
5	Rank and organization at time of discharge		Rank, grade, or rating		Organization, regiment, station, ship, etc.
	Cpl.		346 Machine gun Bn.		SERIAL NUMBER
					Date of enlistment
					Date of discharge
					Sept 19 1917
					1.16.1919
6	AMOUNT OF INSURANCE APPLIED FOR, \$ 5000.00				
	PLAN OF INSURANCE APPLIED FOR: Endowment, Age 62. (Enter plan selected, whether Ordinary Life, 20-payment Life, 30-payment Life, 20-year Endowment, 30-year Endowment, Endowment at age 62, or 8-year Convertible Term. Make separate application for each different plan.)				
8	I WILL PAY PREMIUMS AS INDICATED BELOW: (Make cross mark X and insert amount of premium under method selected)				
	Monthly	Quarterly	Semiannually	Annually	
	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	\$17.32
9	Do you apply for total disability benefits for which an extra premium is required? (Answer "Yes" or "No")				
	No				
10	I REQUEST THAT THE EFFECTIVE DATE of this policy be made the first day of March 1st 1932				
	(The insurance hereby applied for, if granted, shall become effective on the first day of the month in which valid application and tender of necessary premiums are made and forwarded to the United States Veterans Bureau, unless the applicant specifically requests on his application that it be made the first day of the following month.)				
11	Full name of beneficiary (If married woman, her own first and middle name and husband's last name must be stated)		Relationship to me		Amount of Ins. for each beneficiary
	Rosetta Alice Kelley		Wife		\$5000.00
					Post office address (a) Number and street (b) City, town, or post office.
					1172 Western Ave San Bernardino Calif
12	I desire the proceeds of this policy paid in the event of my death under the following optional settlement indicated by cross mark X below. (See back page for explanation.)				
	No. 1 (X) one sum.		No. 2 () payable in <u>12</u> limited installments		No. 3 () continuous installments.
13	Have you ever applied for (a) Government compensation <u>No</u> ? (b) Training allowance <u>No</u> ? (c) Government insurance <u>No</u> ?				
	(d) Pension <u>No</u> ? If so, give reference number <u>No</u>				
14	(a) Has any application for insurance on your life ever been declined? <u>No</u> (b) Has a policy been offered with plan or amount different from policy applied for? <u>No</u> (c) Has a policy been offered at a premium rate higher than the standard at your age? <u>No</u> If answer to any of these questions is "Yes," describe fully and give dates:				
15	I enclose herewith remittance payable to the TREASURER OF THE UNITED STATES by <u>Money order</u> in the amount of \$ <u>5000.00</u> to cover (a) the first <u>5000.00</u> premium of \$ <u>5000.00</u> on the amount and plan of insurance applied for, plus (b) the (Write above whether monthly, quarterly, semiannual, or annual) <u>5000.00</u> for the total disability benefits applied for. (The applicant must remit with this application a sum not less than the amount of the first monthly premium on the amount and plan of insurance applied for, plus the first monthly premium for the total disability benefits if applied for in answer to Question 9.)				
SIGNED AT	San Bernardino Calif		ON THE 15		DAY OF March
					32
WITNESSED BY	Eosnia Cook		Thomas Joseph Kelley		
					(A special sign here Do not print signature)
ADDRESS	1172 Western Ave San Bernardino Calif				

The law provides that "Whoever * * * makes any statement of a material fact knowing it to be false, shall be guilty of perjury and shall be punished by a fine of not more than \$5,000, or by imprisonment for not more than two years, or both."

CALIF. 9382

35 After examination do you find any abnormality of the heart? no
Is it irregular? no Does it intermit? no Is there a murmur? no
(If any heart disability is found or suspected, a complete and detailed report should be submitted on a separate sheet)

36 Has applicant's weight increased recently? no Diminished? no If so, state cause, how much, and within what period. nothing

37 After examination, do you find any abnormality of the lungs? no (Afternoon temperature is required in slender persons with suspected tuberculosis tendency or with suspicious signs.) Obtain a careful history of every so-called pleurisy case with special reference to duration, effusion, and what disease it followed. Record the facts here. If any abnormality of the lungs exists, make a special detailed report on a separate sheet.)
Temperature 78 - 1 30 am

38 After an examination do you find any abnormality of the nervous system? no Skin? no Ear? no Eye? no
Abdomen? no or digestive system? (Answer each "Yes" or "No" If "Yes" describe fully.)

* Note: In case a neuropsychiatric disability exists a complete report by a competent neuropsychiatrist should be submitted on separate sheet.
39 URINALYSIS: Specific gravity 1020 Albumin no Casts no Have you knowledge that the urine examined was passed by the applicant at the time of examination? yes
Reaction acid Sugar no Test used products

40 Has applicant ever had syphilis, gonorrhea, or rheumatism? (State which) no 41 Any defects in the sight or hearing? no 42 Any deformity or departure from normal in any respect? no

43 Has the applicant lost an eye, hand or arm, foot or leg? no 44 Is the ability to work impaired in any way? If so state particulars. no

45 Is the applicant ruptured? no Is it reducible? no Give type, size, and location no

46 How long have you known applicant? 9 yrs By what person are you introduced to the identity of the person examined? Personal acquaintance Give some mark of identification. none

47 Are you related to applicant? no 48 Was this examination made at your home or office, or at applicant's home? State place and address. my office 529 - 5th St. San Bernardino Calif

49 Do you recommend acceptance of the risk? yes First-class risk yes Fair risk no Poor risk no 50 Are answers to questions of medical examination in your own handwriting? yes

51 FEMALES: Any history of uterine or ovarian diseases? no Married: If pregnant, month advanced? no Date of last confinement? no Was it normal? no Number of miscarriages, if any, and dates. no

52 Are you satisfied that everything has been fully stated regarding the physical condition, habits, personal and family history of the applicant? yes

53 REMARKS:

FOR CENTRAL OFFICE USE ONLY
(Do not write in this space)

54 Examination James Joseph Kelly (Name of person examined)

made and signed this 15

day of March 1932

Walter D. Jones, M.D.
(Signature - Official designation)

529-5th St. San Bernardino Calif
(Address)

California
(Name of State in which you are licensed to practice medicine)

CALIF. 1-9382

INSTRUCTIONS FOR EXECUTING APPLICATION FOR U. S. GOVERNMENT LIFE INSURANCE.

Applications should be completed in ink, or type-written except as to signature of applicant. Write Plainly.

If more than one kind of insurance is desired, a separate application should be submitted for each plan of insurance applied for.

1. Name of Applicant.—Your complete name is necessary. For example, do not state the name as "J. P. Jones," "John P. Jones," or "J. Paul Jones," but as "John Paul Jones."

2 Residence.—Your home address should be fully stated. If you live in a large city, state the complete name of the street, avenue, boulevard, or place, and give the house number. If you live in a town or village, give only the name of the town or village post office from which you receive your mail, and rural route number, if any.

9. Total Disability Benefits.—In accordance with the provisions of Section 311 of the World War Veterans' Act, as amended May 29, 1928, an insured is eligible to apply for total disability benefits, payable in the event he is totally disabled for a period of twelve consecutive months. This benefit is independent of and in addition to the disability benefits provided in the insurance contract, and is granted only to those in good health upon proper

application and the payment of the additional premium necessary to cover the benefits.

11. Beneficiary.—The insured under a United States Government life-insurance policy may designate any person, firm, corporation, or legal entity as beneficiary under the policy either individually or as trustee. You should write the name or names of beneficiaries in full. Do not state the name to be “Mrs. John Paul Jones,” but state as “Mary Jane Jones.” You should also state what relation the beneficiary is to you.

12. Optional Settlements.—The insured may select any one of the following three options for payment of insurance benefits upon his death:

Option 1. Insurance payable in one sum.—Settlement under this option will be made only when selected by the insured during his lifetime or by his last will and testament. When such selection has been made the face amount will be payable in one sum at the maturity of the policy by death.

Option 2. Insurance payable in limited installments.—The installments noted below will be payable for an agreed number of months (not less than 36) to the designated beneficiary, but if such beneficiary dies before the agreed number of monthly installments have been paid, the remaining unpaid monthly installments will be payable in accordance with the beneficiary provisions of the policy.

Number of monthly installments	Amount of installment for each \$1,000 of insurance	Number of monthly installments	Amount of installment for each \$1,000 of insurance
36.....	\$29.19	144.....	\$8.46
48.....	22.27	156.....	7.94
60.....	18.12	168.....	7.49
72.....	15.35	180.....	7.10
84.....	13.38	192.....	6.76
96.....	11.90	204.....	6.47
108.....	10.75	216.....	6.20
120.....	9.83	228.....	5.97
132.....	9.09	240.....	5.75

Note.—If this option is selected, the applicant should be careful to insert in the blank space the correct number of monthly installments desired.

Option 3. Insurance payable in installments throughout life.—The installments noted below will be payable throughout the lifetime of the designated beneficiary, but if such designated beneficiary dies before 240 such installments have been paid, the remaining unpaid monthly installments will be payable in accordance with the beneficiary provisions of the policy.

Age of beneficiary at time of death of insured	Amount of installment for each \$1,000 of insurance	Age of beneficiary at time of death of insured	Amount of installment for each \$1,000 of insurance
10.....	\$3.67	45.....	\$4.79
15.....	3.75	50.....	5.07
20.....	3.84	55.....	5.35
25.....	3.96	60.....	5.56
30.....	4.11	65.....	5.70
35.....	4.30	70.....	5.75
40.....	4.52	75.....	5.75

Amounts of monthly installments for other ages will be furnished upon request.

[Endorsed]: Gov. Exhibit A ident. Filed 5/27, 1941. By Cross, Deputy Clerk. (Later into evidence).

The Court: Will you tell the jury first what this document is?

Mr. Dillon: It is an application to the United States Government for life insurance signed by Thomas Joseph Kelley the 15th day of March, 1932.

(Reading exhibit.)

Mr. Hoffman: May I interrupt just a minute, Mr. Dillon. As to the rest of the application, would it be stipulated that the evidence may go in subject to a motion to strike later if it is not connected up? In other words, unless the Government later can prove that the statements that were made are material or that they were false or untrue, they would be incompetent, irrelevant and immaterial in the trial of this case. Rather than interrupting counsel's reading of the questions and answers I just want him to stipulate that the evidence may go in subject to a proper [7] motion to strike if such motion may be made.

Mr. Dillon: I haven't anything to do about making motions; but we don't stipulate in respect to anything, just because this is over the signature of

the man himself, and we want to show the entire background of the application which is necessary.

The Court: As I understand, Mr. Hoffman, the Government's Exhibit A is merely the application of Mr. Kelley for insurance.

Mr. Hoffman: That is right, your Honor.

The Court: The questions and answers that he made at that time; but the falsity is not before the jury at this time.

Mr. Hoffman: That is right.

The Court: That will have to come up later, at which time, of course, any objection that you care to make will be in the record and ruled upon by the Court.

Mr. Hoffman: I just want to reserve my objection until some later time.

Mr. Dillon: (Continuing to read Government's Exhibit A.)

Mr. Dillon: At this time the Government will offer this document as Government's next exhibit for identification.

The Clerk: B. [8]

(The document so offered was marked Government's Exhibit B for identification.)

Mr. Dillon: Government offers in evidence at this time Government's Exhibit B, standard certificate of death.

Mr. Hoffman: To which we object, your Honor, upon a number of grounds. First, it is incompetent, irrelevant and immaterial what the insured died of.

It doesn't matter what he died of. The question in this case is, Did he, a number of years before his death, make a false statement of fact that he knew was false when he made it. Now it doesn't make any difference what he died of or whether or not he died of a disease that he had at the time. The question is, Did he know he had the disease, and thereafter did he falsely deny that he did have it.

It is objected to on the further ground, your Honor, that it has been stipulated in this case that he died. Therefore, it would be merely cumulative in establishing the fact of death. The cause of death, I submit, your Honor, is immaterial.

The Court: It will be admitted in evidence.

WRITE PLAINLY WITH UNFADING BLACK INK—THIS IS A PERMANENT RECORD

Give item of information should be carefully supplied. AGE should be stated exactly. If unknown, give approximate age. Physicians should state CAUSE OF DEATH in plain terms, so that it may be properly classified. Exact statement of OCCUPATION is very important.

STATE OF CALIFORNIA DEPARTMENT OF PUBLIC HEALTH VITAL STATISTICS									
STANDARD CERTIFICATE OF DEATH					LOCAL REGISTERED NO. 344				
1. PLACE OF DEATH: Los Angeles					COUNTY OF Los Angeles				
2. FULL NAME: Thomas J. Kelley					STREET AND NO: Hospital, Vet. Adm. Facility				
RESIDENCE NO: 1172 Western Ave.					CITY OR TOWN, AND STATE: San Bernardino, Calif.				
3. SEX: Male	4. COLOR OR RACE: White	5. SINGLE, MARRIED, WIDOWED OR DIVORCED: Married			22. DATE OF DEATH: Aug. 10th 1935				
6. IF MARRIED, WIDOWED OR DIVORCED, NAME OF HUSBAND OR WIFE: Rosetta A. Kelley					23. MEDICAL CERTIFICATE OF DEATH				
7. DATE OF BIRTH: Sept. 23rd 1898					I HEREBY CERTIFY THAT I HAVE MADE DECEASED FROM: Aug. 1-1935 TO: Aug. 10-1935				
8. AGE: 36 YR 8 MO 17 DAYS					THAT I LAST SAW HIM ALIVE ON: Aug. 10-1935 AND THAT DEATH OCCURRED ON THE ABOVE STATED DATE AT THE HOUR OF 1:30 A M				
9. OCCUPATION: Engineer AS SPINNER, SAWYER, BUREAUKEEPER, ETC. 10. DATE DECEASED LAST WORKED: Unk					24. CORONER'S CERTIFICATE OF DEATH				
11. TOTAL YEARS SPENT IN THIS OCCUPATION: Unk					I HEREBY CERTIFY THAT I TOOK CHARGE OF THE REMAINS DESCRIBED ABOVE, HELD THEREON, AND FROM SUCH ACTION FIND THAT SAID DECEASED CAME TO HIS DEATH ON THE DATE STATED ABOVE.				
12. BIRTHPLACE (CITY OR TOWN): Unk					THE PRINCIPAL CAUSE OF DEATH AND RELATED CAUSES OF IMPORTANCE, IN ORDER OF ONSET, WERE AS FOLLOWS:				
13. NAME: J.J. Kelley					Aneurysm of the aortic arch leading with compression of trachea				
14. BIRTHPLACE (CITY OR TOWN): Unk					OTHER CONTRIBUTORY CAUSES OF IMPORTANCE				
15. STATE OR COUNTRY: Ireland					Broncho pneumonia, bilateral Fibrosis of spleen				
16. MAIDEN NAME: Unk					IF OPERATION, DATE OF: None				
17. BIRTHPLACE (CITY OR TOWN): Unk					WAS THERE AN AUTOPSY? Yes				
18. BIRTHPLACE (CITY OR TOWN): Ireland					CONDITION FOR WHICH PERFORMED: NAME LABORATORY TEST CONTAINING DIAGNOSIS				
19. A. CITY, TOWN OR RURAL DISTRICT OF DEATH: 22					25. IF DEATH WAS DUE TO EXTERNAL CAUSE (VIOLENCE) FILL IN THE FOLLOWING.				
B. IN CALIFORNIA: 22					ACCIDENT, SUICIDE OR HOMICIDE? DATE OF INJURY:				
C. IN U.S., IF OF FOREIGN BIRTH: 22					INJURED: CITY OR TOWN OF: AT				
20. EMBALMER: Records of Veterans Administration Facility					COUNTY AND STATE OF: San Bernardino, Calif.				
21. BIRTHPLACE (CITY OR TOWN): San Bernardino, Calif.					DID INJURY OCCUR IN HOME, INDUSTRY, OR PUBLIC PLACE? WAS THERE AN AUTOPSY?				
22. DATE: Aug. 10-1935					26. IF DISEASE/INJURY RELATED TO OCCUPATION SPECIFY: None				
23. SIGNATURE: Ed Simpson					27. SIGNATURE: Ed Simpson				
24. ADDRESS: San Bernardino, Calif.					28. WHEN REQUIRED BY LAW: Unk				
25. FILED: Aug. 10-1935					29. CORONER: Unk				

EXAMPLE I

The principal cause of death and related causes of importance were as follows:

rickleclerosis
chronic interstitial nephritis
cerebral hemorrhage

Other contributory causes of importance: **22**

Date of onset: **1915**

1921

July 5, 1927

May 1, 1928

The principal cause of death and related causes of importance were as follows:

Attack of epilepsy

Run over by street car

Peritonitis

Other contributory causes of importance:

Gastroenteritis

Date of onset: **1 week ago**

1 week ago

3 days ago

1 year

EXAMPLE II

The principal cause of death and related causes of importance were as follows:

The principal cause of death and related causes of importance were as follows:

Date of onset: **1 week ago**

1 week ago

3 days ago

1 year

Mr. Hoffman: May we have an exception?

The Court: Exception noted.

Mr. Dillon: May I read a certain portion?

The Court: Yes.

Mr. Dillon: (Reading Government's Exhibit B.)

As the dates of the application and of the denial have [9] been stipulated to, I desire to have marked as an exhibit a letter of August 29, 1935.

The Clerk: Defendant's Exhibit C for identification.

(The document referred to was marked Defendant's Exhibit C for identification.)

Mr. Dillon: Defendant offers at this time Defendant's Exhibit C.

Mr. Hoffman: To which we object, your Honor. We have stipulated that they have disagreed with the Plaintiff, and the effect of this letter would merely be to set forth the reasons why, which are immaterial. Whether the reasons were good or bad is not in issue in this case. They have disagreed with Plaintiff, and to read this communication, which I would like the Court to look at, would not add anything except to give the reasons that the particular writer of the letter had. Then we object to it on the further ground that no proper foundation has been laid. The production of the original letter has not been demanded, and you can't offer a copy without notice to produce the original.

Mr. Dillon: The second ground is undoubtedly true. I could take the stand and testify that I took

it from the files of the Veterans' Administration myself.

Mr. Hoffman: I will withdraw my second objection. I know the Government doesn't produce carbon copies of letters they don't send. I would reasonably believe the original was received. I haven't got it because it was addressed to a man [10] in Washington, D. C.

Mr. Dillon: Copy was sent to Mrs. Kelley.

Mr. Hoffman: I don't think it is admissible in view of the stipulation we have entered into admitting the fact of disagreement.

Mr. Dillon: The purpose of the letter is—it is the usual letter of disagreement and shows the grounds on which the Government refused to pay the claim under this insurance.

The Court: The Plaintiff in her complaint, Paragraph VI, states that a disagreement exists between the Plaintiff and the Defendant over the \$5,000 benefits. So I assume that this is part of that denial.

Mr. Hoffman: That is right.

The Court: And also part of the issue there. On that ground it will be admitted.

DEFENDANT'S EXHIBIT C

August, 29, 1935

FCB

Kelley—Thomas J.
XC-1 783 258

Captain Watson B. Miller
Chairman, National Rehabilitation Committee
The American Legion
1608 K Street, N. W.
Washington, D. C.

My dear Captain Miller:

This will acknowledge receipt of your letters dated August 20th and August 23, 1935, forwarding evidence in support of the claim of Mrs. Rosetta Alice Kelley for adjusted compensation, insurance and pension in the case of the above named former service man.

Action will be taken to effect settlement of the claim of Mrs. Kelley for adjusted compensation benefits as soon as the loan record has been received from the office of this Administration, Los Angeles, California.

With reference to insurance you are informed that while the veteran was in the service he was granted yearly renewable term insurance in the amount of \$10,000, on which premiums were paid through the month of January, 1919. On March 15, 1932, the veteran applied for \$5,000 insurance. In his application the veteran stated that he was in good health; that he was not treated for diseases

enumerated on the application, including heart and blood vessels, and that he never had rheumatism or heart disease. This Administration relying on the statements made by the veteran issued policy K-919,427, in the amount of \$5,000. In his application for compensation the veteran stated that he was suffering from rheumatism, heart and spine trouble during December, 1919.

Therefore, it appears that the veteran withheld information material to insurability at the time that he applied for his insurance. Accordingly, it will be necessary to cancel policy K-919,427 on account of the fraudulent misrepresentations made by the insured and the claim of Mrs. Rosetta Alice Kelley for insurance benefits must be disallowed.

Information regarding the claim for pension will be furnished in a separate communication.

Respectfully,

H. L. McCOY,

Director of Insurance.

[Endorsed]: Deft Exhibit No. C ident. Filed 5/27, 1941. By Cross, Deputy Clerk. (Later admitted)

Mr. Dillon: May I read certain portions, your Honor?

(Reading exhibit.)

The Court: I think we will take our morning recess.

(At this point a short recess was taken, after which proceedings were resumed, as follows:)

Mr. Hoffman: May I ask that the jury at this time be instructed that the contents of the letter are not proof of any fact, but that the letter was read merely to show the reason the Government didn't want to pay it, and not as evidence of the truth or falsity of any facts set forth in [11] the letter.

Mr. Dillon: I agree.

The Court: Counsel's statement is correct, and the jury will be so instructed.

Mr. Dillon: I offer this for identification as Defendant's Exhibit next in order.

The Clerk: Defendant's Exhibit D.

(The document referred to was marked Defendant's Exhibit D for identification.)

Mr. Dillon: Defendant offers in evidence Defendant's Exhibit D.

(The document referred to was received in evidence and marked Defendant's Exhibit D.)

DEFENDANT'S EXHIBIT D

January 8, 1936

FCB

Kelley—Thomas J.

XC-1 783 258

Mrs. Rosetta Alice Kelley
1172 Western Avenue
San Bernardino
California.

Dear Madam:

Receipt is acknowledged of your letter dated January 2, 1936, requesting that you be advised as to the action taken on the claim which you submitted for the insurance benefits under policy K-919427.

For your information we are inclosing herewith a copy of a letter which was forwarded to the National Rehabilitation Committee of the American Legion under date of August 29, 1935, concerning this claim.

Respectfully,

H. L. McCOY,

Director of Insurance.

Incl.

Copy of Letter

8-29-35

JEG:GT

[Endorsed]: Deft. Exhibit No. D ident. Filed
5/27, 1942. By Cross, Deputy Clerk.

Mr. Hoffman: We will stipulate, your Honor, that Mrs. Kelley got a copy of the letter that was sent to the American Legion. That was Defendant's Exhibit C.

Mr. Dillon: I offer this to be marked for identification.

The Clerk: Defendant's E for identification.

(The document referred to was marked Defendant's Exhibit E for identification.)

Mr. Dillon: Defendant offers in evidence Defendant's Exhibit E.

(The document referred to was received in evidence and marked Defendant's Exhibit E.)

DEFENDANT'S EXHIBIT E

Application of Veteran

For Disability Allowance Under Section 200,

World War Veterans' Act, 1924

As Amended July 3, 1930

Name (Print clearly)—Kelley. Thomas Joseph.

Address—1172 Western Ave., San Bernardino, Calif.

I hereby apply for disability allowance under the provisions of Section 200 of the World War Veterans' Act, 1924, as amended July 3, 1930, and submit the following facts as evidence that I am eligible for that allowance.

1. (a) Place of birth—Crystal Lake, Colorado.
- (b) Date of birth—Sept. 23, 1892.

2. Description of applicant as of date of this application:

Sex—Male Race—White Weight—116
pounds. Height 60½ inches. Color of
hair—Brown Color of eyes—Blue Com-
plexion—Medium.

3. Make a cross (x) after branches of service you served in:

Army x, Navy....., Marine Corps.....,
Coast Guard.....

4. Give dates of enlistment and discharge for each period or periods of service during the World War, commencing prior to November 11, 1918.

Enlisted,

Date—Sept. 19, 1917.

Place—Dillon, Mont.

Serial No. 2,253,294.

Discharged

Date—Jan. 16, 1919

Place—Camp Dodge, Ia.

Rank and organization—Cpl. Unassigned

Character of discharge—Honorable.

Note.—If during any of these enlistments you served under a name other than the one used in this application, state the name under which you served, the period of the enlistment, and full explanation.

5. (a) Have you ever applied for disability compensation?—No.

(b) When and where?.....

- (c) What is your Compensation Claim number?
- (d) Have you ever been physically examined for the United States Veterans Bureau?—No. (e) If so, give date and place of last examination.....
6. (a) Are you in receipt of retirement pay?—No.
- (b) Are you in receipt of reduced retirement pay?—No.
- (c) Are you in receipt of retainer pay?—No.
- (d) Are you in receipt of a pension?—No.
- (e) Are you in receipt of disability compensation?—No.
- (f) Are you in receipt of insurance benefits?—No.

7. Nature of disease or injury on account of which disability allowance is claimed—Rheumatism, Heart trouble, trouble with spine.

8. Give full name and complete address of nearest relative—Rosetta Allice Kelley, Wife. 1172 Western Ave. San Bernardino, Calif.

9. Have you ever been dishonorably discharged from any period of service in any branch of the military or naval service?—No. If answer is “Yes” state rank and organization at time of dishonorable discharge, and the date of the dishonorable discharge

10. (a) Are you employed?—Yes.
 (b) What is your regular trade or vocation?
 —Loco. Fireman, U. P. RR.
11. (a) Did you file a Federal income tax return
 for the last year?—No.
 (b) Where?
 (c) Were you exempted from payment of an
 income tax?—Did not earn enough.
 (d) If so, why?—Did not earn \$3500.00.

I Hereby Certify that answers to all questions are true and complete to the best of my knowledge and belief. (Note sections of law printed on reverse side of form.)

THOMAS J. KELLEY.

Subscribed and Sworn to before me this 31st day of August, 1931, by Thomas J. Kelley, claimant, to whom the statements herein were fully made known and explained.

(Seal)

R. A. WICKIJER,
 Notary Public.

My Commission Expires March 11, 1935.

Quotations from the World War Veterans' Act,
 1924, As Amended July 3, 1930

Title I, Second Paragraph, Section 200.—“On and after the date of the approval of this amendatory Act any honorably discharged ex-service man who entered the service prior to November 11, 1918, and served ninety days or more during the World

War, and who is or may hereafter be suffering from a 25 per centum or more permanent disability, as defined by the director, not the result of his own willful misconduct, which was not acquired in the service during the World War, or for which compensation is not payable, shall be entitled to receive a disability allowance at the following rates: 25 per centum permanent disability, \$12 per month; 50 per centum permanent disability, \$18 per month; 75 per centum permanent disability, \$24 per month; total permanent disability, \$40 per month. No disability allowance payable under this paragraph shall commence prior to the date of the passage of this amendatory Act or the date of application therefor, and such application shall be in such form as the director may prescribe; Provided, That no disability allowance under this paragraph shall be payable to any person not entitled to exemption from the payment of a Federal income tax for the year preceding the filing of application for such disability allowance under this paragraph. In any case in which the amount of compensation hereafter payable to any person for permanent disability under the provisions of this Act is less than the maximum amount of the disability allowance payable for a corresponding degree of disability under the provisions of this paragraph, then such person may receive such disability allowance in lieu of compensation. Nothing in this paragraph shall be construed to allow the payment to any person of both a dis-

ability allowance and compensation during the same period; and all payments made to any person for a period covered by a new or increased award of disability allowance or compensation shall be deducted from the amount payable under such new or increased award. As used in Titles I and V of the World War Veterans' Act, 1924, as amended, the term "compensation" shall be deemed to include the term "disability allowance" as used in this paragraph."

Attorney Fees

Title V, Section 500.—"Except in the event of legal proceedings under section 19 of Title I of this Act, no claim agent or attorney except the recognized representatives of the American Red Cross, the American Legion, the Disabled American Veterans, and Veterans of Foreign Wars, and such other organizations as shall be approved by the director shall be recognized in the presentation or adjudication of claims under Titles II, III, and IV of this Act, and payment to any attorney or agent for such assistance as may be required in the preparation and execution of the necessary papers in any application to the bureau shall not exceed \$10 in any one case."

Penalty

Title V, Section 501.—"That whoever in any claim for compensation, insurance, or maintenance and support allowance, or in any document required by this

Act, or by regulation made under this Act, makes any sworn statement of a material fact knowing it to be false, shall be guilty of perjury and shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than two years, or both."

[Endorsed]: Deft. Exhibit No. E ident. Filed 5/27, 1942. By Cross, Deputy Clerk. (Later into evidence.)

Mr. Dillon: May I read certain portions? [12]

Mr. Hoffman: May I reserve my objections, your Honor, the same as to the other exhibits, along the same line?

The Court: Yes.

Mr. Dillon: This is the application of the veteran for disability allowance under Section 200 of the World War Veterans Act of 1924 as amended July 3, 1930.

(Reading exhibit.)

Mr. Dillon: Mark this for identification.

The Clerk: Defendant's Exhibit F for identification.

(The document referred to was received and marked Defendant's Exhibit F for identification.)

Mr. Dillon: Defendant offers in evidence Defendant's Exhibit F.

(The document referred to was received in evidence and marked Defendant's Exhibit F.)

DEFENDANT'S EXHIBIT F

C-.....

L. A. 20289

Application for Compensation of Veteran Disabled
in the World War

All papers submitted with reference to this claim should bear your full name, also your rank and organization at discharge.

You must furnish the information required in this application, and every question must be answered fully and clearly. Answers must be written in a clear, readable hand, or typewritten. If you do not know the answer to any question, say so.

Forward a certified copy of your certificate of discharge from the service in the World War with this application.

1. Full name—Kelley, Thomas Joseph.

2. Address—1172 Western Ave. San Bernardino, Calif.

A. Military Experience and Related Information

3. Under what name did you serve in the World War?—Thomas J. Kelley.

4. Color—White. Date of birth—Sept. 23, 1892. Place of birth—Crystal Lake, Colo.

5. Date of entering service in the World War—Sept. 19, 1917. Place of entry—Dillon, Mont. Date of discharge from World War service—Jan. 16, 1919. Place of discharge—Camp Dodge, Ia.

6. Company and regiment or organization, vessel

on which, or station in which you served during the World War—Co. B. 346th M.G. Bn.

7. Rank or rating and organization at time of discharge—Cpl. Unassigned, Co. 2, 163, D.Br.

8. Nature of discharge: Honorable—Honorable, ordinary.....; dishonorable.....; bad conduct.....; S. C. D.....

9. Make a cross (x) after branches of service you served in: Army x; Navy.....; Marine Corps.....; Coast Guard.....

(a) Give serial No.—2,255,294.

(b) Were you accepted for general or limited service?—General.

10. State all other period of military or naval service, if any.....

11. Nature of disability claimed—Rheumatism, Heart trouble. Date disability began—Oct. and Nov. 1918.

12. Cause of disability—Spine not known. Where received—in Army service.

13. If you received treatment while in the service give the name, number or location of the hospital, first-aid station, dressing station, or infirmary, or the organization to which it was attached, the dates of treatment, and the nature of sickness, disease, or injury—Base Hospital 48.

(a) Names and addresses of all civilian physicians who have treated you for any sickness, disease, or injury since the beginning of your service in the World War:

Name—Dr. F. P. King D. C.

Present address—Chamber of Commerce Bldg.

Disability—Spinal adjustments.

Date—9-30—Mar. 31.

(b) Names and addresses of all persons other than physicians who know any facts about any sickness, disease, or injury which you have had in active service or since discharge from the World War:

Name—F. W. Rathos.

Address—Pocatello, Ida. c/o Union Pac. RR.

Disability—Heart & Spine trouble, Rheumatism.

Date—Dec., 1919.

(c) Give the names and addresses of employers, monthly wages or salary, occupation or vocation pursued, and periods of time employed since discharged from military service, in the World War. If self-employed for any periods, so state.

Employer—O S L RR.

Address—Pocatello, Ida.

Wages or salary—\$140.00 mo.

Occupation—Brakeman Page.

Period of time employed—Mar. 1919-Dec. 1919.

Employer—Union Pacific R.R.

Address—Los Angeles, Cal.

Wages or salary—\$150.00-200.00 per mo.

Occupation—Loco. Fireman.

Period of time employed—May 1920-present.

14. Are you willing to accept hospital, medical, or surgical treatment?—Yes.

15. If the sickness, disease, or injury was caused through the fault of some person other than the United States or the enemy, state whether suit has been commenced against or settlement made with such person on account of such injury.....

If settlement has been made or damages recovered, state which and the amount.....

B. Pre-Enlistment Occupational History

16. Give the names and addresses of employers, and your monthly earnings for the 24 months preceding your enlistment for service in the World War. If self-employed, so state.

Employer—L. A. & S. L. RR.

Address—Los Angeles.

Occupation—Fireman.

Duties performed—Loco. Fireman.

Dates—6. 1913, 8. 1916.

Employer—B.&C. RR.

Address—Magna, Utah.

Occupation—Fireman.

Duties Performed—Loco. Fireman.

Dates—9. 1916, 4. 1917.

Employer—O.S.L. RR.

Address—Pocatello, Ida.

Occupation—Trainman.

Duties performed—Trainman.

Dates—4. 1917, 9. 1917.

C. Family Obligations and Dependency Claims

17. Are you single, married, widowed, or divorced?—Married.

18. Times married—One. Date and place of last marriage—San Bernardino, Cal. Nov. 4, 1922.

19. Times present wife has been married—Twice. Maiden name—Rosetta Alice Kemmer.

20. Do you live together?—Yes. (a) If not, state reason, and your wife's present address.....

21. Have you any child or children living, including adopted children, stepchildren, and illegitimate children, under 18 years of age and unmarried, or any child of any age who is insane, idiotic, or otherwise permanently helpless? If so, give the following particulars about each child: No.

22. (a) Is your mother now dependent on you for support?—Deceased.

(b) Is your father now dependent on you for support?—No.

D. Miscellaneous Information

23. Did you make an allotment of your pay while in the service?—Yes. \$20.00.

24. If so, to whom?—My Father.

25. Have you ever filed any other claim for compensation on account of any disability?—No.

(a) Give C-Number assigned.....

(b) If so, state the address of the office in which the claim was filed.....

(c) Are you now receiving payments of compensation?—No.

(d) Did you ever receive payments of compensation?—No.

26. Did you every apply for War Risk Insurance?—No.

(a) Give T or K Number.....

27. Have you made claim for Adjusted Compensation (Bonus)? (Yes or No.)—Yes.

28. Are you now drawing naval fleet reserve, retirement, or service pay?—No.

(a) If so, from what date and in what monthly amount?

29. Have you ever applied for a pension to the Bureau of Pensions, Department of the Interior?—No.

(a) If so, give pension claim number.....

(b) Have you ever received payments on a pension claim?—No.

(c) Are you now receiving payments on a pension?—No.

(d) If so, in what sum monthly?.....

I Hereby Certify that answers to all questions are true and complete to the best of my knowledge and belief. I make the foregoing statements as a part of this application with full knowledge of the penalty provided for making a false statement as to a material fact in a claim for compensation or insurance.

THOMAS J. KELLEY.

Subscribed and sworn to before me this 31st day of August, 1931, by Thomas J. Kelley, claimant, to whom the statements herein were fully made known and explained.

(Seal)

R. A. WICKIZER,
Notary Public.

My Commission Expires March 11, 1935.

Penalty

That whoever in any claim for family allowance, compensation, or insurance, or in any document required by this Act, or by regulations made under this Act, makes any statement of a material fact knowing it to be false, shall be guilty of perjury and shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than two years, or both (Sec. 501, W. W. V. A., 1924).

[Endorsed]: Deft Exhibit No. F ident. Filed 5/27, 1941. By Cross, Deputy Clerk. Later into evidence.

Mr. Hoffman: May we reserve our objection?

The Court: So understood.

Mr. Dillon: This is the application for compensation to a veteran disabled in the World War, dated the 31st of August, 1931, signed by Thomas J. Kelley.

May I read certain portions, your Honor?

The Court: Yes.

Mr. Dillon: (Reading exhibit.)

Mr. Dillon: Government offers this for identification.

The Clerk: Government's Exhibit G for identification. [13]

(The document referred to was marked Government's Exhibit G for identification.)

Mr. Dillon: Government offers in evidence Defendant's Exhibit G.

Mr. Hoffman: May we reserve our objections, your Honor, except as to a certain report that is on white paper appended thereto. If you will hand it up to the Court, Mr. Dillon, I can point out to the Court my objection to that portion of the document. My objection may be a little premature because counsel may be able to furnish the proof; but at this time my objection is based on the grounds that the person who made the laboratory report has not been called as a witness. That is true also as to X-ray pictures, as differentiated from the report of the doctor himself. The Ninth Circuit has passed on this question in the case of U. S. V. Le Fevre, 72 Fed. (2d), page 827; and I submit, your Honor, that the rule that permits the medical examinations made—without admitting that that is admissible and reserving my objections to the whole exhibit—but if the rest of it were admissible, I submit that these reports by technicians that on their face don't show that they are doctors, are not proper unless a proper foundation is laid, and I object on that ground.

Mr. Dillon: I don't get the grounds for the objection.

Mr. Hoffman: I will stipulate that it is part of the Veterans' Administration's files because it is clipped to or [14] appended to a medical report. My position is that it is not admissible unless you produce the technician that made the examination.

Mr. Dillon: I will be glad to do that. I will withdraw it at this time.

At this time, your Honor, there is a deposition on file on behalf of the Defendant that I should like to read.

(Reading of deposition of

RICHARD B. POSEY.)

* * *

"Q. Subsequent to July 2, 1927, what was necessary for a man to secure a policy of United States Government Life Insurance, his policy having previously lapsed after his discharge from the military service?"

Mr. Hoffman: That is objected to as calling for a conclusion of the witness. Section 512(a) of Title 38, the United States Code, which is known as Section 310 of the World War Veterans Act, as amended, provides expressly what is necessary for a man to get a converted policy, as follows: (reading section.)

Mr. Dillon: I will withdraw the question, your Honor. Counsel's explanation is more full than the answer.

(Deposition of Richard B. Posey.)

The Court: Yes, the statute covers it.

Mr. Dillon (Continuing to read deposition of Richard B. Posey):

“Q. Mr. Posey, under the procedure of the Veterans’ Administration, when a man applies for compensation what [15] office is that application for compensation filed in?

“A. Usually the Regional Office or facility in the field.

“Q. Now, assuming that a man was a resident, at the time he applied for compensation, of California, where would the application be sent?”

Mr. Hoffman: Your Honor, I object to both of those questions on the ground that it is immaterial what is usually done. The question is, What was done in this case. The practice has certainly nothing to do with whether or not the man did or did not do something. The question is, what Kelley did, not ordinarily what is done.

The Court: Is there some dispute here about the issuance of the policy on the part of the Government?

Mr. Dillon: No, your Honor. The question here is to show that his application for compensation which I read was made here in Los Angeles and not in Washington. The insurance is handled in Washington. The compensation is handled in Los Angeles. Therefore we want to establish, apparently by this question, that it was made in Los Angeles.

(Deposition of Richard B. Posey.)

Mr. Hoffman: We further object on the ground that the two applications introduced are the best evidence as to where they were filed, and they speak for themselves. This witness hasn't shown he knows anything about it.

Mr. Dillon: I will withdraw the question.

"Q. Would the Insurance Service of the central office [16] have any knowledge as to this application for compensation?

"A. They would eventually get the number, C number assigned in that case, but they might not receive the files for a long period of time. They might remain in the field indefinitely."

Mr. Hoffman: I move to strike that portion of the answer that reads,

"But they might not receive the files for a long period of time; they might remain in the field indefinitely."

The Court: It will be stricken out.

Mr. Dillon: (Continuing reading of deposition.)

"Q. Mr. Posey, what is the generally accepted definition of good health?"

Mr. Hoffman: I object to that, your Honor, on two grounds; first, it is a conclusion of law, the proper conclusion of this Court.

Mr. Dillon: He reframes the question. We will see how he reframes it.

(Deposition of Richard B. Posey.)

“Q. Mr. Posey, what is the generally accepted definition of good health, as interpreted by the Insurance Service of the Veterans’ Administration?”

Mr. Hoffman: That is objected to. In the first place, there is nothing to show that Mr. Kelley in San Bernardino had the slightest idea what the accepted meaning was by the Insurance Division; secondly, the law provides that he has to be in good health, and it is for your Honor to determine [17] and instruct the jury what is meant by the terms of the policy, not some fellows sitting back in Washington, unless it can be shown that that definition was communicated to the insured when he made his application and got his insurance.

(Argument)

Mr. Dillon: Well, strike the question.

“Q. And then, under the regulations or procedure of the Veterans’ Administration, before a man would be entitled to have United States Government life insurance granted to him subsequently to July 2, 1927, under the provisions of Section 310 he would have had to have been free from injury or disease at the time the insurance was granted.”

Mr. Dillon: The objection is that the question was leading.

Mr. Hoffman: I will make the objections, if

(Deposition of Richard B. Posey.)

needed, to save time. I have no objection to the form of the question.

Mr. Dillon: (Continuing reading of deposition.)

“A. He would have had to have been in good health.”

The Court: We will take our recess until 2:00 o'clock.

(Thereupon at 12:00 o'clock noon a recess was taken until 2:00 o'clock p. m. of the same date.) [18]

Los Angeles, California

Tuesday, May 27, 1941

2:00 o'clock P. M.

The Court: You were reading the deposition of Mr. Posey, I believe, were you not, Mr. Dillon?

Mr. Dillon: Yes, your Honor.

The Court: Proceed.

Mr. Dillon (Continuing reading of deposition of Richard B. Posey):

“Q. Mr. Posey, I hand you this application and ask if the application contains a question relative to the filing of a claim for compensation.”

Mr. Hoffman: That is objected to, your Honor, on the grounds that the application speaks for itself and is the best evidence. It has been read here.

The Court: Objection overruled.

(Deposition of Richard B. Posey.)

Mr. Dillon (Continuing reading of deposition):

“A. It does have such a question.

“Q. Would you read into the record the question and the answer of the applicant for insurance to that question?”

Mr. Hoffman: Same objection, your Honor, on the grounds that it is just repetition, cumulative evidence.

The Court: Overruled.

Mr. Dillon (Continuing reading of deposition):

* * * “Q. Mr. Posey, assuming that as a fact the applicant [19] for insurance had filed Form 526, a claim for compensation, on August 31, 1931, would the Insurance Service, under its practice and procedure, have made further inquiry before this insurance was granted, to determine what if any disability that claim was based upon?

Mr. Hoffman: I will read the objection that was made at the time, your Honor, and now adopt it as our objection:

“I object for the reason that the question is vague, indefinite, and uncertain; for the further reason that this witness was not engaged in work at the time that the alleged application, which is marked Defendant’s Exhibit No. 1, was acted upon; and that the question asks for hearsay testimony because of the fact that

(Deposition of Richard B. Posey.)

this witness is being asked what someone else would have done or would not have done so far as making inquiry is concerned; and that it is impossible for this witness to state what someone else would have done or would not have done, as asked in the question. All he can give is his idea of what somebody else might or might not do."

I add also the objection that it is hearsay and calls for the conclusion of the witness.

The Court: Sustained.

Mr. Dillon: I rephrase the question as follows:

"Q. Mr. Posey, assuming that as a fact the applicant for insurance had filed Form 526, a claim for compensation, on August 31, 1931, would the Insurance Service have been [20] required, under its practice and procedure, to make further inquiry before this insurance was granted, to determine what, if any, disability that claim was based upon?

Mr. Hoffman: Same objection as before, with the added objection, your Honor, that testimony regarding a custom and usage of the insurance carrier, insurance company, is inadmissible unless it can be shown that the insured knew the custom that the witness is about to relate.

The Court: Sustained.

Mr. Dillon: That isn't the purpose of this question, if your Honor please. The purpose of the

(Deposition of Richard B. Posey.)

question is, What was the practice of the Insurance Department of the Veterans Administration in respect to an application for insurance, whether it was the custom and the practice and the regulations of the Insurance Department to make further investigation under this type of insurance, or to accept the application on its face value. I think that is competent.

The Court: Suppose the custom were established, Mr. Dillon, and then not followed.

Mr. Dillon: Well, in this case, you see, the custom was that they did not. If it wasn't followed, why, it would be entirely different. It would mean that they did look into other things.

Mr. Hoffman: It would appear to me also, your Honor, that no proper foundation has been laid for this witness to testify as to whether they did or didn't look in this particular case. It is not a question of custom; it is, Did they in this instance make any investigation.

The Court: Sustained.

Mr. Dillon: (Continuing reading of deposition)

* * *

"Q. Mr. Posey, if it is shown by the records and on the trial of this case that this insured was examined on October 28, 1931, and at that time was diagnosed as suffering from 'aortitis, chronic mild, with good cardiac tolerance,' and had he made that known to the Veterans' Administration in this application for insurance in

(Deposition of Richard B. Posey.)

1932, would this insurance, under the regulations and procedure of the Veterans' Administration, have been granted?"

Mr. Hoffman: That is objected to on a number of grounds, one of which is that there is no testimony as to what regulations or procedure they are talking about; secondly, there is no showing that the witness is qualified as an expert or is a person who would pass upon or ever did pass upon a single application for insurance, and it is asking for the witness to give his conclusion as to what somebody else might or might not have done, without laying any proper foundation therefor. There is no showing that this witness ever in his life passed on an insurance application.

The Court: That is a matter of cross examination. Overrule the objection.

Mr. Dillon: (Continuing reading of deposition)

[22]

"Q. Or could it have been granted, under the regulation and procedure of the Veterans' Administration."

Mr. Hoffman: I object to that, as to the question of whether it could have been granted, on the grounds set forth, and also that the application shows on its face that it was granted, and the person that granted it or didn't grant it hasn't been

(Deposition of Richard B. Posey.)

produced, and the rules and regulations haven't been produced.

(Argument)

The Court: I think it is a question for the jury. Sustain the objection.

Mr. Dillon (Continuing reading of deposition):

* * *

“Q. Under the regulation and procedure of the Veterans' Administration can a man who is shown to have had a positive Wassermann be granted insurance?”

Mr. Hoffman: That is objected to, your Honor. In the first place, no proper foundation has been laid; in the second place, it calls for a conclusion of the witness; in the third place, it is hearsay, and there is no foundation showing that the witness is qualified; it is highly speculative to say, “Could it have been done?”

Mr. Dillon: The man is testifying as an expert on insurance matters and regulations in the Veterans' Administration.

Mr. Hoffman: I submit he didn't say anything about [23] that. He just said he advises the Insurance Section. He doesn't say about what. He didn't say that he knew anything about the rules and regulations. I submit, your Honor, it doesn't matter, as far as this Plaintiff, the widow, is concerned, what the rules and regulations were.

The Court: The whole question of the case is whether or not the jury will find that the ap-

(Deposition of Richard B. Posey.)

plicant at the time misrepresented the condition of his health, whether he was in good health or not.

Mr. Hoffman: And whether something could have been done seems to me to be speculative.

The Court: Sustained.

Mr. Dillon (Continuing reading of deposition):

“Q. Mr. Posey, are the Veteran’s Administration Regulations and practice and procedure relative to the reinstatement or granting of insurance all in printed form, or have they been built up by custom?”

Mr. Hoffman: Same objection, incompetent, irrelevant and immaterial.

The Court: Overruled.

“A. We have regulations in printed form, but we also have practice that has grown up that is not in printed form.

“Q. And the practice as to the granting of insurance, is it or is it not almost entirely just a practice that has been built up and of which no printed regulations have been promulgated?”

[24]

Mr. Hoffman: I can’t see any materiality as to that, whether it has grown, or like Topsy——

The Court: Overruled.

Mr. Dillon (Continuing reading of deposition):

“A. The only regulation is the one that defines good health—I forget the number of that—but the practice has been to follow the

(Deposition of Richard B. Posey.)

authority in the law for the granting of insurance; and good health has been used to mean in the Bureau exactly what it says, that a man has no illness or disabilities.”

Mr. Hoffman: I object to that on a number of grounds. First, it is not in response to the question. Secondly, it is an invasion of the province of the Court; in other words, the witness is invading the province of the Court in instructing the jury and the province of the jury in determining the ultimate fact in this case. Furthermore, there is no showing that their definition, as argued this morning, as to what good health is, is binding on Mrs. Kelley, the surviving beneficiary, or on the insured; and for those reasons I move to strike from the answer, “and good health has been used to mean in the Bureau exactly what it says, that a man has no illness or disabilities;” on the further grounds that that is a conclusion of law by the witness. What is good health is something for your Honor to instruct the jury in this case and not for the witness, Mr. Posey.

The Court: I think this can be taken into consideration by the jury. He hasn’t attempted to pass on the ultimate question that this applicant was not in good health. He has given here a definition. I am inclined to say that that can be taken into consideration by the jury with whatever other instructions the Court feels the jury should be given

(Deposition of Richard B. Posey.)

in defining good health. I believe you stated to the Court this morning the definition of good health. It would be necessary for the Court to instruct the jury on that question.

Mr. Hoffman: Then if your Honor would instruct the jury, and your instruction would be different from Mr. Posey's idea, I assume that the jury would feel it was bound to follow the Court's definition and not Mr. Posey's definition.

The Court: The jury have already stated that they would all follow the instructions given by the Court.

Mr. Dillon: The instruction submitted is practically in the same language, incidentally.

(Continuing reading of deposition.)

"Q. Then, the practice is that if a man has any illness or disability, no insurance may be granted to him, under Section 310."

Mr. Hoffman: That is objected to on the same grounds; on the further ground that whatever the practice is, is immaterial and not binding on the insured or beneficiary, unless it can be shown that they knew about it. [26]

The Court: I think it is a self-serving declaration because the jury will be instructed that if they find that this man was not in good health, he was not entitled to the insurance.

Mr. Hoffman: One more thing: Not only that he was not in good health, but he knew it, because

(Deposition of Richard B. Posey.)

the test is not whether he was in good health, because the incontestability clause after six months says that only because of non-payment of premiums or fraud——

The Court: The defense here is fraud, of course.

Mr. Hoffman: Therefore, it wouldn't make any difference how sick he was, in fact, when he made out the application. The sole issue is, Did he make a fraudulent statement, to-wit, did he know that he was sick, and not, Was he sick?

Mr. Dillon: That isn't a correct statement of the law, but that will come up when the instructions are given.

The Court: Overruled.

Mr. Dillon (Continuing reading of deposition):

“A. There is no authority for granting the insurance, and any that is granted would be purely an error.”

Mr. Hoffman (Continuing reading of deposition of Richard B. Posey,

Cross Examination.)

* * *

“Q. Mr. Posey, a man's condition at the time of making application for insurance is the criterion which determines whether or not it shall be granted to him, isn't it? [27]

“A. I think the criterion is the condition the man is in when he applies, but in determining that condition it is a well known practice

(Deposition of Richard B. Posey.)

among the medical folks generally that the history of the man's life and what illnesses he has had plays a large part in determining that present condition."

Mr. Hoffman: I move to strike the portion about that it is a well known practice among medical folks generally. This witness has not shown, among all of his brilliant attainments, that he is a doctor and has any knowledge as to what the practice is among medical folks, even though, your Honor, he does advise the Marine Corps.

The Court: Motion granted.

Mr. Hoffman (Continuing reading of deposition):

"Q. Did you ever personally approve an application for reinstatement of insurance?

A. I don't believe I have, but I have been consulted on various times about the forms and what they should require and as to whether they ought to go into substandard business and take some of these folks, and we have discussed all of those things. Both of those doctors were calling on me for information."

Mr. Hoffman: Now, your Honor, I move to strike everything as not responsive, other than the words, "I don't believe I have." What he has been consulted about forms is not responsive to the question as to whether or not he ever approved an application for reinstatement of insurance. He [28]

(Deposition of Richard B. Posey.)

says he didn't. The rest of it is a voluntary statement of the witness.

The Court: It seems to me that is rather frivolous, but I will sustain the objection, or grant the motion.

Mr. Hoffman: (Continuing reading of deposition)

Mr. Dillon (Continuing reading of deposition of Richard B. Posey,

Redirect Examination):

“Q. Just one more question, Mr. Posey. Under the practice of the Veterans' Administration, had this insured at the time of his application stated that he was suffering from aortitis or had been suffering from aortitis and had in October, 1931, had a positive Wasserman, even with the examination of Dr. Lenker showing him to be a good risk and in good health at the time of his examination, could this insurance have been granted under the practice and procedure of the Veterans' Administration without further inquiry to determine his true condition?”

Mr. Hoffman: Objected to, your Honor, on the ground that no proper foundation has been laid; calling for the conclusion of the witness; no showing that this man—the fact is that a little earlier in this deposition, if your Honor will remember, when I was reading the cross, they asked him, “Did

(Deposition of Richard B. Posey.)

you ever approve an application for insurance?" He said, "No, I never did." How does he know, therefore, whether or not a person that approves applications for insurance would do it? It is speculative. [29]

Mr. Dillon: He is testifying merely as to the practices and procedures of the Veterans' Administration.

Mr. Hoffman: I submit, your Honor, he doesn't say he knows anything in that regard. He says he didn't pass on applications for insurance. It is just speculating, your Honor, as to what somebody else would or wouldn't do.

The Court: I think it is the question the jury will have to determine for us. I will sustain the objection.

Mr. Hoffman (Continuing reading of deposition, recross examination):

* * *

Mr. Hoffman: Attached to the deposition is the printed regulation, your Honor, the definition of good health, Section 3155: "The words 'good health' when used in connection with insurance"—I might say, your Honor, we are merely offering this for the limited purpose of showing that it wasn't adopted until May 17, 1934, and the insurance was granted in 1932, not for the purpose of showing that that was a valid or binding definition.

Mr. Dillon: That wasn't what it was introduced

(Deposition of Richard B. Posey.)

for. Your counsel asked him to get it. He said he would get it and attach it to the deposition, that it would be made a part thereof.

Mr. Hoffman: Let's go back, then. I asked him, Was there any regulation in effect on April 2, 1932, when application for insurance was made, defining good health? He [30] said he didn't know. Then he said he would produce the regulation that there was. Here it is: (reading "definition of good health" attached to deposition of Richard B. Posey.)

Mr. Hoffman: Now, your Honor, I move to strike the testimony of the witness Posey relating to the regulations as to good health for the reason that his own testimony shows that the only regulation that there was, was adopted subsequent to the issuance of the policy of insurance.

Mr. Dillon: It doesn't make any difference to me which way you rule, your Honor.

The Court: The Court will take care of that definition.

Mr. Hoffman: His testimony throughout the deposition was that, yes, they had a regulation, and this was it. Then he shows that it wasn't adopted until subsequent to the time that this particular insurance policy was issued. Therefore, we submit that whatever was done after the policy was issued certainly is immaterial in this case.

The Court: Motion granted.

Mr. Dillon: Mark this for identification.

The Clerk: Defendant's Exhibit H. for identification.

(The document referred to was marked Defendant's Exhibit H for identification.)

Mr. Dillon: Government offers in evidence Defendant's Exhibit H. [31]

Mr. Hoffman: I don't see any original, your Honor. I will have to object on the ground that no proper foundation has been laid.

Mr. Dillon: Will it be necessary for me to take the stand and say that this has been taken from the records of the Veterans' Administration?

Mr. Hoffman: Certainly the carbon comes from the records of the Veterans' Administration, but there would have to be some showing that the original was mailed. It comes out of the Los Angeles office here. I have no copy of it. I have no way of knowing that it was mailed. Mr. Kelley is dead. We can't ask him. I submit, your Honor, that the mere fact that the Government has carbons doesn't lay any foundation that the original was, in fact, mailed. If it wasn't mailed, it wouldn't be binding on the insured or his beneficiary.

Mr. Dillon: I will withdraw it temporarily.

The Court: Gentlemen, we will take our afternoon recess, 15 minutes.

(At this point a short recess was taken, after which proceedings were resumed, as follows:)

Mr. Dillon: Call Dr. Burstein. [32]

DR. LOUIS L. BURSTEIN

called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Louis L. Burstein, B-u-r-s-t-e-i-n.

Mr. Hoffman: We admit the doctor's qualifications, admit that he is a medical examiner for the Veterans' Administration and its predecessor, and has been for many years.

The Court: And licensed to practice.

Mr. Hoffman: Yes, we admit all of his qualifications.

Mr. Dillon: At this time Government offers in evidence Defendant's Exhibit G.

DEFENDANT'S EXHIBIT G

Exam. in compliance with

Form 2507 dated 9-23-31

M.2-MS.-18

Disability Compensation

REPORT OF PHYSICAL EXAMINATION

C-No. 1783258

1. Claimant's name—Kelley Thomas Joseph
Address—1172 Western Ave., San Bernardino,
Calif.

2. Examined — Los Angeles, Cal. 10/28/31-
10/28/31

3. Age—39

(Testimony of Dr. Louis J. Burstein.)

4. Color—W

5. If examination was made in a hospital, fill in the following:

Date of admission..... Reason:.....

Date of Discharge..... Reason:.....

6. Rank and organization—Cpl. M.G. Bn. Un-assigned.

7. Date of induction—9-19-17 of discharge from service—1-16-19 (Marital status—check)

8. Brief outline of claimant's disability since service:

“Railroad brakeman before the war. Railroad fireman ever since the war. Am with the Union Pacific as a fireman on oil burners.”

9. Present complaint (subjective symptoms, not diagnosis):

“Backaches. Vision poor.”

10. Physical examination (claimant must be stripped):

Temperature—X, pulse—84, time of day—1:10 p. m., blood pressure—100 (Systolic) 80 (Diastolic); height—61 inches (With shoes); weight—119 (Without coat); standard weight before onset of present illness—118; highest weight over the past year—123; lowest weight over the past year—118. Did you weigh the claimant?—Yes. Sputum (tub. bac.)——

(Testimony of Dr. Louis J. Burstein.)

(Every case, if deemed necessary, should have a sputum examination, certified by the examining physician.)

Vision (Snellen chart):

Uncorrected	R-	/20	L-	/20
Corrected by glasses	R-	/20	L-	/20
Hearing (spoken voice)	R-	/20	L-	/20

Physical examination continued (nose and throat, sinuses; heart (see Marginal Note 1); gastro-intestinal; surgical; orthopedic, etc.):

General Appearance: We have here a small sized, well developed and well nourished man, with brown hair and blue eyes and with skin, sclera and mucosa clear.

Teeth: In apparently fair condition and adequate repair.

Scalp: Ears, Nose & Throat: Negative.

Eyes: Vide special report.

Adenopathy: None.

Reflexes: Normal.

Hernia, Hemorrhoids, Varicosities, Fistulae: None.

Torso, Head, Neck, Abdomen, Genitalia: Negative.

Cardiovascular System: Blood pressure 100/80. Pulse pressure 20. Pulse seated 84; standing 96; after fifty hops, 120; in two minutes' recumbency 84. Pulse is very small and

(Testimony of Dr. Louis J. Burstein.)

soft, almost imperceptible and diffused, of poor volume and quality but rhythmic. Exercise is attended by slight dyspnea and marked neck pulsation, with no attendant cyanosis, pallor or allorhythmia.

Inspection & Palpation: Apex is palpated in the 5th interspace with ACD within normal limits. Impulse is rather weak with moderate precordial diffusion; no thrills.

Auscultation reveals nothing of note until in dorso-recumbency, following provocative exertion, there is elicited a distant but definite low-pitched, systolic blow, gently diffused over the entire aortic area, without PMI, and with all other sounds clear. This phenomena subsides in all other postures and throughout all other procedures. Cardiac tolerance is good.

Respiratory Tract: Chest is well formed, of free and symmetrical excursion and unimpaired resonance; no rales.

Gastro-Intestinal Tract: Negative.

Genito-Urinary System: Venereal history denied. No apparent gross pathology.

Urinalysis: Report attached.

(Blood) Wasserman: Report attached.

Extremities, Back & Joints: Special orthopedic report follows:

“No evidence of deformity or disability.
No edema.”

JOHN CARLING, M.D.

Orthopedic Surgeon.

(Testimony of Dr. Louis J. Burstein.)

Eyes:

“Vision, R. 20/20; L. 20/25 Corrected
to 20/20 L. 20/20. No pathology.”

D. C. McCULLOCH.

X-ray examination (give date, place, authorship,
interpretation):

Laboratory findings (may be copied from original
laboratory report):

Laboratory Report
U. S. Veterans' Bureau
Los Angeles, Calif.

Dr. Burstein	C#1783-258
Name—Kelley, Thos. J.	Date—10-30-31

Wassermann Report
Cholesterin Antigen
Water Bath—Positive

L. GILMORE
Serologist

Examination of Lungs

Shape of chest , mobility

Palpation:

Percussion—Right lung:

Left lung:

Auscultation (during normal inspiration following
expiratory cough; state quality and location of
rales):

Right lung:

Left lung:

Summary of lung findings (indicate areas of infiltration, consolidation, etc., by lobes; add tuberculous complications):

Pulmonary diagnosis—

General diagnosis (based on entire physical condition:

(a) Aortitis, chronic, mild, with good cardiac tolerance.

Is claimant bedridden?—No Is he confined to his bed No because of pulmonary condition?..... or because of other disability?

Is claimant able to travel?—Yes

Do you advise observation to determine diagnosis?—No

Will claimant accept hospital care?—Yes

Is an attendant necessary for travel?—No

Did you examine the claimant yourself?—Yes

Name of Examiner—Louis L. Burstein, M.D.

Title—Attending Specialist (Cardiologist)

Address of Examiner—USVB Los Angeles, California.

(Each examiner will sign his name, and date, immediately following his findings, in a composite report of examination.)

Statement by Claimant.—My answers to Question 9 have been read to me* and I hereby certify that the complaints therein recorded are all that I am suffering from to my knowledge.

(Testimony of Dr. Louis J. Burstein.)

(*The examining physician will read complaints noted in answer to Question 9 before the claimant's signature is affixed.)

Signed THOMAS J. KELLEY.

(Signature of claimant)

D. C. McCULLOCH, M.D.

Attending Specialist (EENT)

JOHN CARLING, M.D.

Attending Specialist (Orthopedic)

[Endorsed]: Deft. Ex. G. iden. Filed 5/27, 1941.

By Cross, Deputy Clerk. (Later into evidence.)

Mr. Hoffman: If I might ask a question of the doctor about this exhibit before it is admitted.

The Court: Yes, you may.

Examination

By Mr. Hoffman:

Q. I show you, Doctor, Defendant's Exhibit G for identification, Examination made October 28, 1931, and call your attention to the form and the words "disability compensation." I ask you to look at that document and tell me if you know the purpose for which the examination was made.

Mr. Dillon: That doesn't go to the introduction.

The Court: I suppose, Mr. Dillon, it is merely prelim- [33] inary.

(Testimony of Dr. Louis J. Burstein.)

Mr. Dillon: It would be all right on cross-examination, but it has nothing to do with whether this can be introduced in evidence or not.

Mr. Hoffman: I think it is important, your Honor. I can't make my objection——

Mr. Dillon: Very well, I will withdraw the objection.

The Court: Proceed.

The Witness: The examination was for the purpose of establishing the presence of disability in the applicant for the purposes of compensation or pension.

By Mr. Hoffman:

Q. It was not made for purposes of treatment; I mean, that was a routine examination to determine the question of whether or not he was entitled to compensation or pension?

A. That is right.

Q. And you did not, as I understand it, advise the applicant as to the result of your findings?

A. No; I had no authority to do anything like that.

Mr. Hoffman: Then we object to the introduction of the document on the grounds, your Honor, it would be wholly immaterial either as to what the doctor found, because whatever he found, it couldn't be the basis for fraud unless the knowledge was communicated to the insured. The claim here is that he fraudulently stated that he was in good health, and the doctor didn't tell him he wasn't in [34]

(Testimony of Dr. Louis J. Burstein.)

good health; then whatever the doctor found would be wholly immaterial; secondly, on the ground that whatever examinations might have been made for purposes other than insurance, under the cases that are cited in proposed instruction No. 8 would be immaterial; and on the additional grounds, your Honor, the principal ground was the one I first stated, that since the doctor says it was for a purpose other than insurance, and also that he didn't communicate the findings to the insured.

The Court: He didn't say "other than insurance." He said, "for insurance."

Mr. Hoffman: No, your Honor. He said it was for compensation and pension, not for insurance. This man hadn't applied for any insurance when this examination was made.

Mr. Dillon: It was made to discover whether or not he had any disability.

(Argument)

Mr. Dillon: The reason for the introduction of this examination is to show this man did have these disabilities; further, to show through this doctor that he was advised of them, knew he did have them. First we have got to establish that he did have them before we can establish that he was advised of them.

Mr. Hoffman: I understood the doctor to just testify that he didn't advise the Plaintiff— [35]

Mr. Dillon: He did not; that is agreed.

(Testimony of Dr. Louis J. Burstein.)

Mr. Hoffman: —that is, the insured, as to the result of the examination; that he had no authority to do it, and he didn't do it.

Mr. Dillon: That is correct.

Mr. Hoffman: What materiality has a medical report when the issues in this case are not, did he or didn't he have certain disabilities, but did he know that he had them.

Mr. Dillon: First we have got to establish that he had them before he could know he had them.

The Court: I will permit you to renew your objection later, Mr. Hoffman, and also move to strike, in view of the statements Government has made.

Direct Examination

By Mr. Dillon:

Q. I hand you Defendant's Exhibit 5, Doctor; calling your attention to the last page there, I will ask you if that is your signature attached thereto.

A. Yes, sir.

Q. Do you have any independent recollection of an examination made of Thomas Joseph Kelley at Los Angeles on October 28, 1931?

A. Independent recollection?

Q. Yes.

A. You mean aside from the records? [36]

Q. Yes. A. I have not.

Q. Then, Doctor, using Defendant's Exhibit G to refresh your recollection, will you state—

(Testimony of Dr. Louis J. Burstein.)

Mr. Hoffman: Pardon me. Before it is shown to the witness, I would like to examine the witness as to whether or not looking at it would refresh his recollection or whether it wouldn't. In other words, it may be that the doctor would say, "I could look at it for a couple of weeks; I still wouldn't remember this man; but what I put down in that report is what I found at the time." But I maintain that report is the best evidence. If the witness can't testify that by looking at it, that would then refresh his recollection so that he could then testify regarding this particular examination, he couldn't refer to the exhibit. Subject to my objection, which your Honor was kind enough to allow me, reading it into evidence, I maintain this witness can't testify as to its contents because the report itself is the best evidence.

The Court: That is correct, as far as you go. Of course, the witness testified that without it he has no independent knowledge. Now, refreshing his memory with the name and what is written upon it, probably some of it in his own hand, then he would probably be able to recall some of the circumstances, which is very usual of a witness. I don't know. If he does, then, of course, it is perfectly [37] proper.

Mr. Hoffman: Doctor, if you looked at that report, would that recall to you the examination that you made of this man?

The Witness: No, sir.

(Testimony of Dr. Louis J. Burstein.)

Mr. Hoffman: I object to the use of the document.

(Argument)

The Court: Proceed, counsel.

By Mr. Dillon:

Q. At that time what physical examination did you make of Thomas J. Kelley, and what was your diagnosis?

A. This was a complete examination made by a board of three doctors of which I was chairman.

Q. What was the diagnosis, Doctor?

A. The diagnosis at that time was chronic mild aortitis with good cardiac tolerance.

Q. Now will you explain what "aortitis" means?

Mr. Hoffman: Pardon me, your Honor. May it be understood that my objection is to the introduction of the document, and any objection I have to the reading of it on the grounds that it is immaterial will also be reserved.

The Court: I think you better make your objections to specific questions because certainly a medical term can be explained by a witness, because neither the jury and certainly the Court is unable to tell what these medical terms are. [38]

Mr. Hoffman: Or counsel, talking for myself. My objection was to the question just before this one, "Now, Doctor, what is the diagnosis." I just want my objection to that reserved. There is no objection to this next question.

(Testimony of Dr. Louis J. Burstein.)

The Court: All right.

By Mr. Dillon:

Q. Will you explain that diagnosis, Doctor?

A. The word "aortitis" is simply an inflammation of the aorta. The aorta is the large blood vessel leading out of the heart, the initial stage of the distribution of the blood all through the body. That is the large vessel. When this vessel becomes involved in an inflammation, we take the term from the name of the vessel itself and we call it an aortitis, the same as appendicitis; appendicitis is named after the appendix; so aortitis would be an inflammation of this great vessel, the aorta.

Q. When a diagnosis of aortitis is made, is that suggestive to an expert like yourself who made the examination of a concomitant condition of some character?

A. Yes.

Q. Of what condition is that usually indicative?

A. The word "usually," I can't use the word "usually" there; but with a diagnosis of that kind we always call for a blood test for evidence of syphilis.

Q. Was a blood test called for in this case?

A. A blood test was called for. [39]

Q. Did you receive a report of that blood test?

A. Yes, sir.

Q. What did that blood test show?

Mr. Hoffman: Same objection. I understand the same ruling.

(Testimony of Dr. Louis J. Burstein.)

The Witness: It came back positive from the laboratory. I don't know the exact proportion just offhand, but it fits in with the diagnosis of aortitis.

By Mr. Dillon:

Q. Doctor, basing your answer on your experience as an expert, from the examination you have before you in 1931, I ask you if the evidence in this case shows that Thomas J. Kelley died on August 10, 1935; that the principal cause of his death was aneurism of the aortic arch, luetic, with compression of trachea, would or would not, in your opinion, that be a progression from the condition you found in 1931?

Mr. Hoffman: Object to that on a number of grounds; 1, it is assuming a fact not in evidence; secondly, that it is immaterial in this case what this man died of, or whether his condition progressed or didn't progress subsequent to the time of the application for insurance. Now, the question isn't, Did he or didn't he die of this disease; the question is, Did he know of it and was it of sufficient severity to interfere with his occupation and ability to follow an occupation at the time he made the application, not what happened afterward. [40]

Mr. Dillon: Ability to follow an occupation has nothing to do with the case. The effect of this is to show the materiality of the misrepresentation; that it was of such serious significance that it developed into his death. There couldn't be anything more material that I could see.

(Testimony of Dr. Louis J. Burstein.)

The Court: Objection overruled. Give your answer, Doctor, please.

The Witness: Will you repeat the question?

(The question referred to was read by the reporter, as follows:

“Q. Doctor, basing your answer on your experience as an expert, from the examination you have before you in 1931, I ask you if the evidence in this case shows that Thomas J. Kelley died on August 10, 1935; that the principal cause of his death was aneurism of the aortic arch, luetic, with compression of trachea, would or would not, in your opinion, that be a progression from the condition you found in 1931?”)

The Witness: It would.

Mr. Dillon: That is all; thank you. [41]

Cross Examination

By Mr. Hoffman:

Q. Doctor, when you examined this man was he stripped?

A. All my patients are stripped.

Q. Then this man would be stripped?

A. Yes, sir.

Q. Naked?

A. Absolutely naked from head to foot.

Mr. Hoffman: That is all.

Mr. Dillon: That is all; thank you, Doctor.

(Witness excused.)

MRS. GLADYS H. SIMPSON

called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Mrs. Gladys H. Simpson, S-i-m-p-s-o-n.

Direct Examination

By Mr. Dillon:

Q. Where were you employed in November, 1931?

A. I was employed at the United States Veterans' Administration Bureau at that time in Los Angeles.

Q. What was your position and what were your duties there?

A. I was an adjudication clerk in the Adjudication [42] Division, and my work consisted of making awards of compensation and advising claimants as to the contents of same.

Q. I hand you Defendant's Exhibit H, and call your attention to the printed letters at the right-hand corner, and ask you what they are.

A. You are referring to the printing?

Q. Yes. A. It says, "File GHS."

Q. Whose initials are "GHS"?

A. They are my initials.

Q. And it was your custom, or was it not, at that time, to use a stamp to put those initials on those letters? A. Yes.

(Testimony of Mrs. Gladys H. Simpson.)

Q. When those initials were put on that letter what did that indicate?

A. That indicated that I had read the contents thereof and sent it to the file, this copy for our file, at that time.

Q. From your own knowledge after that letter had been dictated and approved by you what was the custom as to its mailing?

Mr. Hoffman: Object to a custom, your Honor. The question is whether this particular letter, if she knows, was mailed.

The Court: Overruled. [43]

By Mr. Dillon:

Q. Please state.

A. I didn't get the question.

Q. What was the custom then as to the mailing after you signed the letter; what did you do with it?

A. Well, I deposited the letter in the mail box there in the section—a mail box, I should say.

Q. Then what was the custom, to your knowledge, as to what happened to that letter in that basket?

A. Then it went to the mail section, of course.

Q. Then when it got to the mail section what was done with it there?

A. Well, they sent the letter out.

Q. Put it into the mail, you mean?

A. Yes.

Mr. Dillon: That is all; thank you.

(Testimony of Mrs. Gladys H. Simpson.)

Cross Examination

By Mr. Hoffman:

Q. Did you sign the letter personally, Mrs. Simpson, or did you just—— A. Apparently I did.

Q. Mrs. Simpson, will you show me where your initials are on this document, Exhibit F?

A. My initials aren't there, but my file stamp is there. [44]

Q. You have better eyesight than I have. Let me see if I can see it. Point it out to me.

The Court: Point it out to counsel.

The Witness: "File GHS." (Indicating)

By Mr. Hoffman:

Q. Then you put that on there so that somebody in the bureau there would then have authority to file away the carbon; is that right?

A. Yes; I did—I beg your pardon. I filed the carbon myself in the folder.

Q. You don't sign the letters, do you?

A. I had authority at that time, yes.

Q. Did you, do you remember?

A. Apparently I did.

Mr. Hoffman: No further examination.

(Witness excused.) [45]

RICHARD P. HASKINS

called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Richard P. Haskins, H-a-s-k-i-n-s.

Direct Examination

By Mr. Dillon:

Q. Mr. Haskins, where are you employed?

A. Veterans' Administration.

Q. What is your present position?

A. Chief of the Mail and Records Section.

Q. In November 1931 where were you employed?

A. Mail and Record Bureau.

Q. Do you have personal knowledge of the custom, practice and usage of the Veterans' Administration mail room and facilities? A. Yes, sir.

Q. In November 1931 when a letter had been dictated and signed, then placed in the box for outgoing mail, what happened to it then?

A. Well, it was picked up by the messenger and delivered to the mail room where it was folded and put in an envelope and mailed out.

Mr. Dillon: That is all; thank you.

Mr. Hoffman: No cross examination.

(Witness excused.) [46]

Mr. Dillon: Government now offers in evidence Government's Exhibit marked for identification H.

Mr. Hoffman: To which we object, your Honor. No notice to produce has ever been served on the Plaintiff.

(Argument)

The Court: Objection overruled. It will be admitted in evidence.

The Clerk: Defendant's Exhibit H.

(The document referred to was received in evidence and marked Government's Exhibit H.)

DEFENDANT'S EXHIBIT H

File
G.H.S.
11-18

Nov. 17, 1931.

AC.4/AS.9

Mr. Thomas Joseph Kelley,
1172 Western Ave.,
San Bernardino, California.

C-1 783 258

Dear Sir:

Your claim for disability allowance under Section 200, World War Veterans Act, 1924, as amended, has been considered by the Rating Board of this office.

Your disability, aortitis, chronic, mild, is rated less than permanent partial 25%. In order to be eligible for disability allowance, a rating of permanent partial 25% or more is necessary. Your claim

for disability allowance, accordingly has been disallowed.

Your claim for disability compensation was also considered under date of November 13, 1931, and it is the decision of the Board that your disability, aortitis, chronic, was not incurred in or aggravated by your service. A compensable disability must have been incurred in or aggravated by service and exist to a degree of ten percent or more. It was, therefore, necessary to disallow your claim for disability compensation.

By direction,

R. B. LEACH,

Regional Adjudication Officer,
Los Angeles, California.

[Endorsed]: Deft. Exhibit No. H. ident. Filed 5/27, 1941. By Cross, Deputy Clerk. (later in evidence.)

Mr. Dillon: At this time I will read Defendant's Exhibit H, your Honor.

(Reading exhibit)

Government rests, your Honor.

The Court: How much time do you want to argue?

Mr. Hoffman: We have some rebuttal. [47]

ROSETTA ALICE KELLEY

the plaintiff herein called as a witness on her own behalf, in rebuttal, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please.

The Witness: Rosetta Alice Kelley.

Direct Examination

By Mr. Hoffman:

Q. Mrs. Kelley, you are the plaintiff in this case?

A. I am.

Q. And Thomas Joseph Kelley was your husband during his lifetime? A. Yes, sir.

Q. When did you first meet Mr. Kelley?

A. I met him in 1921.

Q. When were you and Mr. Kelley married?

A. 1922.

Q. Where? A. In San Bernardino.

Q. Did you live there after that?

A. We lived there ever since.

Q. When did Mr. Kelley go up to the Presidio at San Francisco in connection with his duties as a Reserve Officer?

A. Well, he went up about once every year.

Q. Did he go up in 1934? A. Yes, sir. [48]

Q. And between the time that you first met Mr. Kelley and the early part of 1934 what was his occupation?

A. He was a locomotive fireman for the Union Pacific Railroad.

(Testimony of Rosetta Alice Kelley.)

Q. Did he work for the railroad during all that time as a locomotive fireman? A. Yes, sir.

Q. And how often did he work, how many days a week?

A. He was subject to call 24 hours. He was on the helpers service.

Q. How many days a week did he actually work on an average?

A. He had to work eight hours a day anyway.

Q. Every day?

A. Yes, sir, on to 16 hours.

Q. Sometimes he worked 16 hours?

A. Yes, sir.

Q. Was that true in the year 1930?

A. Yes, sir.

Q. And 1931? A. Yes, sir.

Q. 1932?

A. Well, no; he worked from 8 to 12 hours a day in 1932.

Mr. Dillon: That is immaterial. The man's work record is not in issue. [49]

Mr. Hoffman: We maintain, your Honor, that a man working 16 hours a day is certainly not telling a lie when he says he is in good health.

Mr. Dillon: That isn't the test, your Honor. A man with great disability can work under unusual circumstances and very often does.

The Court: It would be just a circumstance.

(Testimony of Rosetta Alice Kelley.)

By Mr. Hoffman:

Q. Mrs. Kelley, during this time was Mr. Kelley away from home on account of illness, that is, before the early part of 1934 when he went to the Presidio the last time?

A. He never was home sick until the last time he took sick.

Q. That was on his return from the Presidio, California?

A. Yes, sir; he took sick up there.

Q. Did he ever complain to you about any illness or disease or disability?

Mr. Dillon: I object, your Honor, hearsay.

The Court: Yes.

Mr. Hoffman: We don't expect to prove what he said; just the fact as to whether he did or didn't complain would go to show whether or not he consciously made any misrepresentations.

The Court: Objection of the Government sustained. [50]

By Mr. Hoffman:

Q. Do you know whether or not at any time before 1934 when he returned from the Presidio he had consulted a physician?

Mr. Dillon: Of your own knowledge.

The Witness: No, I don't.

By Mr. Hoffman:

Q. Did any doctor bills come to the house?

Mr. Dillon: That is objected to as immaterial.

(Testimony of Rosetta Alice Kelley.)

The Witness: The company doctor always had him come every so often to be examined by the company; every two years they had to take an examination. That is all I know of.

By Mr. Hoffman:

Q. The only doctors he ever saw or consulted were the physical examinations that were made in connection with his work for the Union Pacific?

A. Yes, sir.

Mr. Dillon: I object, your Honor. That is just hearsay on her part.

Mr. Hoffman: If she knows.

Mr. Dillon: She just said now that she didn't.

The Court: You said you didn't?

The Witness: No, I didn't.

The Court: It may go out.

Mr. Hoffman: You may cross examine. [51]

Cross Examination

By Mr. Dillon:

Q. Do you know of your own knowledge that, as a matter of fact he had considerable treatment for his back? A. No, I don't know.

Q. You don't know that he went to any osteopath? A. No, I don't.

Q. Do you know Dr. King?

A. I know of him, yes, sir.

Q. You don't know of your own knowledge that he gave treatments to your deceased husband?

A. No, I don't.

(Testimony of Rosetta Alice Kelley.)

Q. Did you know Dr. Lenker? A. Yes, sir.

Q. Do you know of your own knowledge whether or not he consulted Dr. Lenker?

A. He was the company's doctor.

Q. Do you know of your own knowledge whether Dr. Lenker is alive or not? A. He is dead.

Mr. Dillon: That is all.

Mr. Hoffman: That is all, Mrs. Kelley.

The Court: Mrs. Kelley, your husband died on August 10, 1935?

The Witness: Yes, sir.

The Court: How long was he ill before that?
[52]

The Witness: Well, he went up to the Reserve Officers Training in February 1934, and he took a heavy cold and took down with pneumonia after he got up there. He was up there for six weeks, seven weeks.

The Court: He went up there in February, '34?

The Witness: Yes, sir.

The Court: He remained up there for seven weeks?

The Witness: Yes, sir.

The Court: Then he returned some time in April?

The Witness: In April or May, somewhere around in there.

The Court: To San Bernardino?

The Witness: Yes, sir; he came home. I had to help him into the car. I went up and met him at

(Testimony of Rosetta Alice Kelley.)

the station. I had to help him in the car. Then he went to the hospital there in San Bernardino and was there for six weeks with pneumonia.

The Court: He died in the hospital?

The Witness: Sawtelle, yes, sir.

The Court: Sawtelle?

The Witness: Yes, sir.

The Court: That is here, is it?

The Witness: Yes, West Los Angeles.

The Court: That is all.

Mr. Hoffman: We have no further testimony right now. [53]

The Court: In view of the fact that we can conclude this case tomorrow, get the arguments in in the morning, and the jury will be able to receive the case in the afternoon, gentlemen, we will now take an adjournment until 10:00 o'clock tomorrow morning.

(Whereupon, an adjournment was taken at 4:15 o'clock p. m. to Wednesday, May 28, 1941 at 10:00 o'clock a. m.) [54]

Los Angeles, California

Wednesday, May 28, 1941 10:00 O'clock A. M.

The Court: Gentlemen, will you stipulate the jury are all present?

Mr. Hoffman: Yes, I will so stipulate, and they have been present at all stages of the proceeding.

So stipulated, Mr. Dillon?

Mr. Dillon: Yes.

Mr. Hoffman: Call Dr. Chapman.

DR. JAMES L. CHAPMAN

called as a witness on behalf of the Plaintiff, in rebuttal, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, Doctor?

The Witness: James L. Chapman.

Direct Examination

By Mr. Hoffman:

Q. What is your profession or occupation, Doctor? A. Physician and surgeon.

Q. What schools did you attend?

A. University of California at Berkeley and the University of Southern California in Los Angeles.

Q. And you are regularly admitted to practice medicine [55] in the State of California?

A. I am.

Q. Do you have any occupation or duties in connection with any insurance company?

A. I have.

Q. What are they?

A. I am examiner for life insurance for five different companies, for one of which I am chief medical examiner.

Q. Besides that do you have a general practice, Doctor? A. I do.

(Testimony of Dr. James L. Chapman.)

Q. Do you hold a commission in the armed forces of the United States in the Medical Corps Reserves?

A. I do.

Q. Now, Doctor, I show you Defendant's Exhibit G, a medical report made October 28, 1931, and ask you to look at the same, with the exception of the diagnosis which is on the back page. Will you just read this report other than the last page thereof?

Now, Doctor, is there anything in that report that indicates, taking the report as a whole—would you say that the person examined, Thomas Joseph Kelley, suffered from any diseases or disability at that time which were of sufficient severity as would call itself to his attention; in other words, of such severity that he would be cognizant and know that he had it, any disability? [56]

Mr. Dillon: Objected to, your Honor. It would be speculating on the part of the witness. He is no position to determine what Mr. Kelley would have thought.

The Court: In that form I will have to sustain the objection. He wouldn't know, counsel, what would be in the man's mind.

Mr. Hoffman: I didn't mean that, your Honor.

Q. Is there any disability or disease that is shown in the report, assuming the facts set forth there are true, of such severity, or of sufficient severity so that the patient would be cognizant of the disability?

(Testimony of Dr. James L. Chapman.)

Mr. Hoffman: The doctor can—for example, there is the report as to the condition of his heart. Let's say that the doctor's opinion was that the heart condition wasn't sufficiently severe that it would be noticeable by the man himself. I am not talking about any person.

Mr. Dillon: Is this a question or argument?

The Court: I think counsel is trying to sustain his position on his question, isn't that so?

Mr. Hoffman: Yes.

The Court: I believe Government's objection, counsel, is good. I think the doctor can testify as to his condition and the aggravation of it, if any. I think it would have to be a matter for the jury to determine from his professional knowledge and as an expert, the ultimate fact which you have just indicated. If you will proceed along that line. [57]

By Mr. Hoffman:

Q. Is there anything in that report, Doctor, that indicates that his vision was poor at the time of the examination?

A. The report states it was normal.

Mr. Dillon: I would like that premise, in the doctor's opinion.

Mr. Hoffman: Everything he says is in the doctor's opinion. He has never seen Mr. Kelley or examined him. I am asking for opinion evidence.

The Court: It will be so understood.

(Testimony of Dr. James L. Chapman.)

By Mr. Hoffman:

Q. Is there anything in that report that indicates that he at that time suffered from any condition that would cause a backache?

Mr. Dillon: I object, your Honor. As pointed out yesterday, the report speaks for itself. There is no explanation the doctor can make because he never examined the man. He can explain some terms, but he can't go into the findings of the report which would speak for themselves.

The Court: Counsel, I am inclined to agree with part of Government's position on that; but it is proper under the law of evidence for a doctor to be asked, assuming that a person had a certain affliction, what effect it would have, and as to that extent I think it is proper.

Mr. Dillon: If he takes a hypothetical question, I have [58] no objection.

Mr. Hoffman: I will skip that for the moment.

Q. Calling your attention to the report that reads as follows: "Extremities, back and joint special orthopedic report; no evidence of deformity or disability; no edema; John Carling, M. D., Orthopedic Surgeon." Is there anything in that portion of the report or elsewhere in the report that shows any abnormal condition of this man's back?

Mr. Dillon: I object, your Honor. The opinion would be based on the diagnosis of another physician.

(Testimony of Dr. James L. Chapman.)

Mr. Hoffman: That is not a diagnosis there. He says he made an orthopedic report, the Government doctor, and found nothing abnormal.

Mr. Dillon: Where is the report?

Mr. Hoffman: That is the report, not his diagnosis.

The Court: If you frame it in the form of a hypothetical question, you may proceed.

By Mr. Hoffman:

Q. Doctor, assuming the following facts to be true; that on October 28, 1931 there was no edema present, and an examination of the extremities, back and joints showed no evidence of deformity or disability; assuming also all the other facts and matters set forth in that report that you have read are true, excluding therefrom the diagnosis; is there anything in that report that shows any disability or disease or injury or abnormality of the back?

[59]

Mr. Dillon: The report speaks for itself. There are only two findings in the report.

Mr. Hoffman: Will you stipulate there was nothing wrong with his back?

Mr. Dillon: The report speaks for itself. It states there was no abnormality found, so there is no question of opinion from the witness at all.

Mr. Hoffman: If the Government's position is that there was nothing wrong with his back, I am not going to pursue it any further. Is that your position?

(Testimony of Dr. James L. Chapman.)

Mr. Dillon: Our position, you know, is not that. Our position is that the report made at that time shows there was no abnormality in the back.

By Mr. Hoffman:

Q. Doctor, assuming the facts in that report are true, and assuming that at the time and before the report was made, and thereafter until January of 1934 Mr. Kelley was employed as a railroad fireman and worked not less than six days a week, and from 8 to 14 hours a day; have you an opinion as to whether or not his condition at that time in October 1931, the date of that report, was such that it would affect his ability to pursue his usual vocation?

Mr. Dillon: I object to that, if your Honor please; first, it is without the issues; second, his condition is the determinative issue in this case.

[60]

By Mr. Hoffman:

Q. Assuming all these facts that I have related heretofore to you, Doctor, to be true, what effect, if any, would any disability that is shown in that report have upon his ability to pursue his usual vocation?

A. I don't believe it would have any effect.

Q. Now, Doctor, I show you Defendant's Exhibit A and call your attention to the medical examiner's report beginning with what is set forth as Paragraph 2. I ask you whether that report shows any disease or abnormality of mind or body,

(Testimony of Dr. James L. Chapman.)

assuming the facts therein set forth are true, and if so, what.

Mr. Dillon: Objected to because the report itself shows on its face that there were no disabilities found by the medical examiner at that time.

Mr. Hoffman: If that is the Government's position——

The Court: Counsel has just stated that this doesn't indicate any abnormality.

Mr. Hoffman: If that is his position and he is not going to retract from it, we will not pursue the matter any further.

Q. Now, Doctor, I will ask you this: Is there anything in the report of October 28, 1931 that indicates the presence of any chancre or chankroid or scar, resultant scar therefrom, in that examination.

Mr. Dillon: If your Honor please, the report speaks [61] for itself. There is nothing said about it in that report. How could he possibly draw any conclusion.

The Court: Sustain the objection.

Mr. Hoffman: Is it your position also that there is no such thing in there?

The Court: Counsel has just stated that it isn't in there.

Mr. Hoffman: Fine, your Honor; that is splendid.

Q. Now, Doctor, you have treated and examined people with regard to venereal diseases?

(Testimony of Dr. James L. Chapman.)

A. Yes.

Q. And the disease known as syphilis?

A. Yes, I have.

Q. You will notice in that report that it states there is a positive blood Wassermann. Is there anything in the report, the entire report, that indicates that at that time the syphilitic condition, assuming that it existed, had any effect upon the health or bodily condition of the patient?

A. No, it had no effect, visible effect, at that time.

Q. Now, Doctor, in regard to the disease of syphilis, generally speaking, is the patient cognizant of the disease prior to the time that he has a severe breakdown—let's frame it this way: Is it usual that people who are suffering from syphilis in its earlier or milder stages do not know [62] that they have the disease?

A. No; they usually know it.

Q. How is the disease manifested to their knowledge?

A. By abrasions on different parts of the body, angry appearing abrasions or sores, followed by rashes on the body with a period of headache, chills, fever—at the onset of the rash, I am speaking of—sore throat, general feeling of poor health.

Q. What effect does the disease have upon their ability to work?

A. At that time it would hinder a person's attempt to work.

(Testimony of Dr. James L. Chapman.)

Q. Now, Doctor, assuming that on the date of this examination in October 1931 the patient was given a thorough examination and was stripped naked; the examiner found or made no note of any rashes, abrasions, sores, no complaints of headache. Have you an opinion as to the severity or the condition of the syphilis at that time?

Mr. Dillon: Objected to, your Honor. It would be simply conjecture. There is no diagnosis in the report of syphilis.

Mr. Hoffman: That is what I am complaining about.

Mr. Dillon: There isn't a word of syphilis used in the report. He would be testifying about something that doesn't exist as far as the evidence in that report goes.

Mr. Hoffman: Is it the position of the Government now [63] that the positive syphilis laboratory report is not true or correct; that you are not claiming he suffered from syphilis?

Mr. Dillon: Don't be silly. I say there is no diagnosis of syphilis in that report. Of course, there is a positive Wassermann; but there is no basis in that report for any diagnosis of syphilis.

Mr. Hoffman: Your Honor, this doctor can't base his diagnosis on the diagnosis of any other doctor. That has been settled. I am asking him—I thought it was plain language, as plain as I am capable of, which has a lot of limitations, your Honor, trying to ask him whether, assuming that he was stark naked and the doctor made a careful

(Testimony of Dr. James L. Chapman.)

examination of him, and assuming he found no such scars, abrasions, rash, and so forth; and assuming at the same time that a laboratory report showed a positive Wassermann, and then asking the doctor if he had any opinion as to the severity of the disease at that time.

Mr. Dillon: I will withdraw my objection.

The Court: Counsel, if you put your question as you have explained, your hypothetical facts, there is no objection. The objection of the Government was that you have referred to a report in which there was no mention of syphilis made, and therefore you negative the proposition that you propounded. [64]

By Mr. Hoffman:

Q. Assuming, Doctor, the following facts to be true: That on October 28, 1931 Mr. Kelley received a thorough and complete examination, at which time he was stripped naked, and that at no time was any discovery made of any rash, scars, chancre, or any of the other matters that you related heretofore as being things that call their attention to the patient of the presence of syphilis, and that there was a positive Wassermann; I will ask you whether you have an opinion as to the extent and severity of the disease of syphilis if the patient was then suffering from it.

Mr. Dillon: I object, your Honor, for the reason that there has been no evidence that there was any such indications; secondly, the positive evidence that there must have been some indication or a

(Testimony of Dr. James L. Chapman.)

Wassermann wouldn't have been taken. So the question is not a fair question.

The Court: Read the question.

(The question referred to was read by the reporter as follows:

"Q. Assuming, Doctor, the following facts to be true: That on October 28, 1931, Mr. Kelley received a thorough and complete examination, at which time he was stripped naked, and that at no time was any discovery made of any rash, scars, chancre, or any of the other matters that you related heretofore as being things that call [65] their attention to the patient of the presence of syphilis, and that there was a positive Wassermann; I will ask you whether you have an opinion as to the extent and severity of the disease of syphilis if the patient was then suffering from it.'")

The Court: Counsel, was the Wassermann made the same date, October 28, 1931?

Mr. Hoffman: About two days later. It was part of the same report, attached to it. Government introduced it into evidence.

Mr. Dillon: We admit the report of the Wassermann.

(Argument)

The Court: I am inclined to think, counsel, that this is a matter of argument to the jury as to what the conditions were at that time. The Government

(Testimony of Dr. James L. Chapman.)

has taken its position as to what its argument is going to be. I will overrule the objection and permit the witness to answer.

The Witness: My opinion is that that condition of his blood and of his organs, if affected at that time, was in a very mild degree.

By Mr. Hoffman:

Q. Can you tell us, Doctor, the meaning of the following, if it has a common meaning in the medical profession: "Genito-urinary system: No apparent gross pathology." What is meant by the word "pathology"?

A. Disease. [66]

Mr. Hoffman: You may cross examine.

Cross Examination

By Mr. Dillon:

Q. Doctor, of what company are you chief examiner?

A. State Life Insurance Company of Indiana.

Q. What?

A. State Life Insurance Company.

Q. And what are the other companies that you examine for?

A. The Manhattan Life of New York, Liberty Life of Topeka, Kansas, Northern Life of Seattle, Washington.

Q. Doctor, if you are examining an applicant for these companies, and as a result of that examination you found an aorta, and that led you to have a Wassermann made, and that Wasserman was

(Testimony of Dr. James L. Chapman.)

positive; would you recommend that applicant as a good risk for insurance?

Mr. Hoffman: Object to that, your Honor, on the ground it is not proper cross; also that that isn't the issue here in this case.

Mr. Dillon: This is cross examination of the doctor.

Mr. Hoffman: There was nothing brought out in chief as to what he would do or wouldn't do.

The Court: If I get your point, Mr. Dillon, it goes to the question of whether or not he would consider such a man, in his professional opinion, in good health? [67]

Mr. Dillon: That is it.

The Court: I will sustain the objection in the form that is put.

By Mr. Dillon:

Q. Doctor, if in your examination you found aorta, and that led you to have a Wassermann made, and that Wassermann was positive, would it be your opinion that that man was in such good health as to recommend him as an insurance risk at that time?

Mr. Hoffman: That is objected to on the same grounds as before. It is the identical question.

The Court: Overrule the objection. Proceed.

The Witness: Would you repeat what I found on that particular person?

(Testimony of Dr. James L. Chapman.)

The Court: It is not what you found on that party. The question is a hypothetical question, and you are to assume that the facts stated in counsel's question are correct; whether they are or not, you are to assume that they are correct and express your opinion.

Now, Mr. Reporter, will you read the question?

(The question referred to was read by the reporter, as follows:

“Q. Doctor, if in your examination you found aorta, and that led you to have a Wassermann made, and that Wassermann was positive, would it be your opinion that that man was in such good health as to recommend him as an [68] insurance risk at that time?”)

By Mr. Dillon:

Q. If you found then, aortitis—I will substitute that.

Mr. Hoffman: One further objection. Object also on the grounds that no definition has been given the doctor as to the words “insurance risk.” Also that the question is not fair or complete for the reason that it hasn't been shown to the doctor, or to anybody, as to what the requirements are of the insurance company, the hypothetical insurance company that Mr. Dillon is talking about.

The Court: Objection overruled. I assume that we are dealing with a hypothetical question, and the doctor is to assume that these facts stated by

(Testimony of Dr. James L. Chapman.)

counsel are correct. It is a matter of argument for counsel, for yourself and for Government counsel, to show that they are not correct if they are not. Proceed.

The Witness: I would say that the man was a poor risk and subject to declination.

By Mr. Dillon:

Q. And if, Doctor, the same hypothetical person I have described with those conditions in 1931 died August 10, 1935 of aneurism of the aortic arch, luetic with compression of the trachea, would or would not it be your opinion that that was a progression of the condition found in 1931?

Mr. Hoffman: Will you pardon me if I interrupt you. [69] Yesterday I was under the impression, your Honor, that this exhibit had not been introduced in evidence but had merely been marked for identification. If you will recall, yesterday I objected to a question of Mr. Dillon on the ground it assumed a fact not in evidence, still under the impression that this exhibit hadn't been offered in evidence.

The Court: That was the death certificate.

Mr. Hoffman: I would like at this time to move to strike the death certificate as to any portions thereof relating to the diseases that he then was suffering from, or the cause of death, and to strike the death certificate on the grounds that the certified copy of the death certificate or the original is

(Testimony of Dr. James L. Chapman.)

inadmissible to prove the cause of death. It is admissible to prove the fact of death but not the cause, and I have three cases involving War Risk insurance, one of which is in the Ninth Circuit. The Ninth Circuit case is U. S. v. Blackburn, 33 Fed. (2d), page 564. In that case the Court said that a death certificate is "not competent evidence as to the causes of death." Then it goes on: "The ruling admitting the certificate was prejudicial because the jury would naturally attribute the early indisposition of the disease to the malady which eventually caused his death some years later." That is the same situation here. It might be inferred that because he died of a certain disability, that he had it in a severe degree before. That is one of the very reasons that the death [70] certificate is inadmissible to prove that fact.

I move to strike the exhibit, which I find has been introduced, and ask the Court to admonish the jury to disregard any of the contents of it that have been read. The fact of death, of course, has been stipulated.

The Court: It wouldn't make any difference whether the facts in the hypothetical question stated by counsel are found in any instrument. He may be using the language that is in an instrument, but it is not necessary to refer to that. He can say, "Assuming that a man had such and such, and died of it," without any certificate at all, without any discussion of the certificate. That would be proper.

(Testimony of Dr. James L. Chapman.)

Mr. Hoffman: I think there is a limitation to that rule, that is, a hypothetical question must be based upon some evidence no matter what view the person propounding the evidence gives. I couldn't ask the doctor what effect hoof and mouth disease would have on this man, when there is no evidence whatever that he had or could have had such a disease. I can't go beyond the realm of the evidence.

The Court: Well, I am sure that you are over-looking this point of evidence; that is, that you can ask any expert witness questions outside the record if you have not stipulated to his qualifications.

Mr. Hoffman: That's right. As I understand it, then, the Court will instruct the jury that the weight to be given [71] to this man's testimony must be measured by whether or not the question is supported by the evidence.

The Court: Certainly. Not only that, counsel, but the jury are the sole judges of all expert testimony. They are not bound by any expert. They will have to use their own judgment entirely on these questions of fact.

Read the question, Mr. Reporter.

(The question referred to was read by the reporter, as follows:

“Q. And if, Doctor, the same hypothetical person I have described with those conditions in 1931 died August 10, 1935 of aneurism of the aortic arch, luetic, with compression of the

(Testimony of Dr. James L. Chapman.)

trachea, would or would not it be your opinion that that was a progression of the condition found in 1931?")

Mr. Hoffman: That is objected to on the further ground that it is incompetent, irrelevant and immaterial. The issue in this case is not what he died from; the issue is, Did he know he had the disease when he took out the insurance and falsely state that he didn't.

The Court: Overrule the objection.

The Witness: Is your question, Would that be a progression of the disease he had on the prior examination?

By Mr. Dillon:

Q. Yes.

A. I believe it would be a progression of that condition. [72]

Mr. Dillon: That is all; Thank you, Doctor.

Redirect Examination

By Mr. Hoffman:

Q. Isn't it true, Doctor, that a large number of people——

Mr. Dillon, this may not be actually proper rebuttal. Have you any objection on those grounds to my asking him the question?

Mr. Dillon: Let's hear the question.

(Testimony of Dr. James L. Chapman.)

By Mr. Hoffman:

Q. Doctor, are there any persons under the age of 40 years who have been employed for 10 or 15 years as railroad firemen who would be 100 per cent free from any abnormal condition in the mind or body in your opinion?

Mr. Dillon: I am sure the doctor will answer no.

The Court: Well, let the expert answer.

The Witness: Perhaps I didn't just quite get the question.

The Court: Read the question, Mr. Reporter.

(The question referred to was read by the reporter, as follows:

“Q. Doctor, are there any persons under the age of 40 years who have been employed for 10 or 15 years as railroad firemen who would be 100 per cent free from any abnormal condition in the mind or body in your opinion?”) [73]

The Witness: I believe there would be some abnormalities present.

By Mr. Hoffman:

Q. And do you believe, Doctor, that there would be male persons of the age of 39 or 40 years who had followed some gainful occupation since they were adults who, at the age of 39 would show no clinical or other evidence of any disease or of any injury or of any abnormality, or of any infirmity or residual of disease or injury to any degree that might in the slightest tend to weaken or impair the

(Testimony of Dr. James L. Chapman.)

normal function of the mind or body, or tend in the slightest degree to shorten life? In other words, would there be many persons, in your opinion, of that age and that experience who would be in that condition? A. No.

Mr. Hoffman: That is all.

Mr. Dillon: That is all, Doctor.

(Witness excused.) [74]

JOSEPH E. SCOTT

called as a witness on behalf of the Plaintiff, in rebuttal, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Joseph E. Scott.

Direct Examination

By Mr. Hoffman:

Q. What is your occupation, Mr. Scott?

A. Title examiner.

Q. For whom?

A. Title Insurance and Trust Company.

Q. Did you know Thomas Joseph Kelley during his lifetime? A. I did.

Q. When did you first meet him?

A. In February 1923.

Q. How often did you see him between that time and February 1934? Frequently or infrequently?

(Testimony of Joseph E. Scott.)

A. Very frequently.

Q. And on those occasions when you saw him what was his apparent condition of health? Was it good or poor?

A. Good.

Mr. Dillon: I object to the "apparent condition of his health." His physical appearance is all right, but this witness is not a doctor; he can't testify as to his health. [75]

Mr. Hoffman: May I hand this case to the Court where the very question is passed upon, *Corrigan vs. U. S.*, 82 Fed. (2d), 106 on page 109, which was decided in 1936 by the Circuit Court of Appeals, Ninth Circuit; and I might refer to the citation from *Corpus Juris* at this point, your Honor which they quote with approval. You will notice the words "apparent condition of health."

Mr. Dillon: Withdraw the objection, your Honor.

The Court: Read the question.

(The question referred to was read by the reporter, as follows:

"Q. And on those occasions when you saw him what was his apparent condition of health? Was it good or poor?")

The Witness: Good. I never knew him to be sick at any time or complain.

Mr. Hoffman: Cross examine.

Mr. Dillon: No cross examination.

Mr. Hoffman: That is all; thank you.

(Witness excused.) [76]

JOHN F. HOSFIELD

called as a witness on behalf of the Plaintiff, in rebuttal, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: John F. Hosfield.

Direct Examination

By Mr. Hoffman:

Q. What is your occupation?

A. Secretary-manager, Elks Lodge in San Bernardino.

Q. How long have you been secretary of the Elks Lodge in San Bernardino?

A. 17 years.

Q. And during that time have you known Thomas Joseph Kelley? A. Yes.

Q. About what year did you first meet him?

A. I have known him all that time.

Q. Did you see him frequently or infrequently?

A. I saw him frequently, two or three or four times a month, during that time.

Q. Calling your attention to all of that 17 years up to January 1934, what condition of health did he appear to you to be in? Did he appear to be sick or well?

Mr. Dillon: I object to "sick or well," your Honor. [77]

By Mr. Hoffman:

Q. Did he appear to be in good health or bad health?

(Testimony of John F. Hosfield.)

A. He appeared to be in good health.

Q. At any of those times did he make any complaint to you about his condition of health?

Mr. Dillon: Object to that. It would be self-serving, even if it wasn't hearsay.

The Court: That is a little beyond the rule, even in this case. Sustain the objection.

Mr. Hoffman: That is all.

Mr. Dillon: That is all.

(Witness excused.)

NELSON WOODS

called as a witness on behalf of the Plaintiff, in rebuttal, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Nelson Woods, W-o-o-d-s.

Direct Examination

By Mr. Hoffman:

Q. Mr. Woods, what is your occupation?

A. Locomotive engineer.

Q. For what railroad do you work?

A. Union Pacific.

Q. Did you know Thomas Joseph Kelley during his [78] lifetime? A. Yes, sir.

Q. When did you first meet him?

(Testimony of Nelson Woods.)

A. Well, I have a recollection of meeting him about 1915, the first time.

Q. When after the war did you see him again?

A. Well, that would be around about '24, along in there.

Q. Do you know what occupation he followed since 1924 up to January, 1934, of your own knowledge, during those 10 years? A. Mr. Kelley?

Q. Yes.

A. He was a locomotive fireman.

Q. Did he work with you on the same locomotive during that time? A. Yes, sir.

Q. During any of that time? A. Yes, sir.

Q. When did he first start working with you on the same locomotive?

A. Well, around in '29, somewheres along in there.

Q. Up until about January or February 1934?

A. Yes, sir, along in there.

Q. During that time how many days a week, to your knowledge, did Mr. Kelley work? [79]

A. As a general thing we worked, I would say, seven days a week.

Q. Seven days a week? A. Yes, sir.

Q. How many hours a day would Mr. Kelley work?

A. That varied quite a bit. Sometimes it would run eight hours a day, sometimes nine.

Q. What would be the minimum?

(Testimony of Nelson Woods.)

A. The minimum would be about eight hours a day seven days a week.

Q. What work did he do as locomotive fireman?

A. On this particular job he had quite a bit to do because he had to throw switches; in other words——

Mr. Dillon: I don't see the materiality of this, your Honor.

Mr. Hoffman: The materiality, your Honor, is that if he was in good health, he wasn't sick, and if he wasn't sick, he didn't misrepresent anything, and consequently, if he was in good health, the Government had to issue the policy.

The Court: I assume, counsel, it is going to the question of fraud. Proceed.

By Mr. Hoffman:

Q. You may proceed as to what his duties were. You said he threw switches?

A. He had to do the duties of, you might say, [80] conductor and fireman both; he had to throw the switches, and quite often he went in and got the orders for me while I was taking care of something that might be wrong with the engine.

Q. While the engine was under way what would he do?

A. He would fire the engine.

Q. Is that strenuous work?

The Court: That is a conclusion, counsel.

Mr. Dillon: Yes.

(Testimony of Nelson Woods.)

By Mr. Hoffman:

Q. What would he do when, you say, he fired the engine?

A. Well, he would keep up 210 pounds of steam or we would have a complaint about it if he didn't, and he generally did; he was a good fireman.

Q. Explain to the jury what other things he actually did on the engine about keeping up the steam pressure?

A. It was an oil burner, you know. It is a little bit different from a coal burner, but it requires quite a bit of ability and skill to fire an oil burner properly.

Q. Does it take any physical effort?

A. Oh, yes, quite a bit.

Mr. Hoffman: You may cross examine.

Mr. Dillon: No cross examination.

(Witness excused.) [81]

JOSEPH H. GROSS

called as a witness on behalf of the Plaintiff, in rebuttal, having been first duly sworn, was examined, and testified as follows:

The Clerk: Your full name, please?

The Witness: Joseph H. Gross, G-r-o-s-s.

(Testimony of Joseph H. Gross.)

Direct Examination

By Mr. Hoffman:

Q. What is your occupation, Mr. Gross?

A. I am a retired railroad conductor.

Q. When did you retire? A. 1937, July.

Q. Before that did you work for the Union Pacific?

A. No, I worked for the Santa Fe.

Q. And did you know Thomas Joseph Kelley?

A. Yes, sir.

Q. During what years did you know him?

A. Sir?

Q. During what years did you know him?

A. Well, for the past 10, 15 or 20 years, I expect.

Q. And did you know him in the years 1929, '30, '31, '32, and '33? A. Yes, sir.

Q. How frequently did you see him?

A. Well, very often. He was in the helper service of the Union Pacific, and I was working for the Santa Fe, [82] and we would be going to Barstow and they would be coming down. We would contact them at the top of the hill, a place we call Summit a great many times.

Q. The two railroads use the same track between San Bernardino and——

A. They use a joint track between Riverside and Daggett.

(Testimony of Joseph H. Gross.)

Q. And the times that you saw him did he appear to you to be in good health or bad health?

A. Good health.

Mr. Hoffman: Cross examine.

Mr. Dillon: No cross examination.

Mr. Hoffman: Through inadvertence I forgot to prove one paragraph of the complaint. May I have the complaint? Plaintiff would like to put in testimony in regard to Paragraph VIII of the complaint which is denied by the Government in its answer.

The Court: Will you step to the bench, counsel?
(Counsel approach the bench.)

The Court: Counsel for Plaintiff has called my attention to the allegations of Paragraph VIII, and in the opinion of the Court it is not necessary to introduce any testimony as to the allegations in Paragraph VIII, that matter being a matter entirely for the Court. Is that a correct statement?

Mr. Dillon: Yes, your Honor. [83]

Mr. Hoffman: As to Exhibit B, I move to strike on each and all of the grounds previously given.

The Court: I think I will grant that motion. Have you anything to say about it before I rule?

Mr. Dillon: I have no objection, your Honor.

The Court: All right, motion granted. The exhibits will be stricken from the record.

Mr. Hoffman: With that, Plaintiff rests.

Mr. Dillon: Defendant rests.

I would like to make a motion outside the presence of the jury, if I may.

(Whereupon the Court and counsel retired to chambers, outside the presence of the jury.)

Mr. Dillon: Comes now the Defendant and makes its motion for a directed verdict for the reason that it has established by a preponderance of the evidence its affirmative plea that fraud was perpetrated by this Plaintiff in securing the insurance herein sued upon; and for the further reason that the Plaintiff has not rebutted by any substantial evidence this affirmative plea.

The Court: Motion will be denied. Exception will be allowed the Government.

(Whereupon the Court and counsel returned to the court room in the presence of the jury.)

The Court: Gentlemen of the jury, counsel have agreed on a limitation of their argument to 20 minutes. Plaintiff [84] will first address you, and Plaintiff is privileged to take any part of that time for his opening argument.

Opening Argument on Behalf of Plaintiff

By Mr. Hoffman

Argument on Behalf of Government

By Mr. Dillon

Closing Argument on Behalf of Plaintiff

By Mr. Hoffman

Court's Instructions to the Jury

(Whereupon, at 2:45 o'clock p. m., the jury retired from the court room for deliberations.)

[Endorsed]: Filed Jan. 16, 1942. [85]

[Endorsed]: No. 10027. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Rosetta Alice Kelley, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed January 22, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10027

UNITED STATES OF AMERICA,

Appellant,

vs.

ROSETTA ALICE KELLEY,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL HEREIN

(Rule 19, Subdivision 6 of C. C. A., Ninth Circuit)

The appellant herein and the appellee having by stipulation designated the parts of the record neces-

sary for the consideration of the appeal herein, the said appellant hereby designates the points upon which it intends to rely upon the appeal herein as follows:

1. That the trial court erred in denying defendant's motion for a directed verdict, and submitting the case to the jury for its determination, for the reason that defendant, by affirmative, substantial evidence, established as a matter of law, that the insurance policy sued upon had been obtained by fraudulent misrepresentations made by the insured in his application to the defendant for said insurance.

2. That the trial court erred in ordering judgment to be entered on the verdict.

3. That the trial court erred in making and entering its minute order of July 2, 1941, denying defendant's motion for judgment notwithstanding the verdict.

Dated this 24th day of January, 1942.

WM. FLEET PALMER,
United States Attorney,
DANIEL DILLON,
Attorney,
Department of Justice,
Attorneys for Appellant.

Receipt of a copy of the within Statement of Points upon which Appellant intends to Rely on

Appeal herein is hereby admitted this 24 day of January, 1942.

SYLVESTER HOFFMAN,

Attorney for Appellee.

[Endorsed]: Filed Jan. 26, 1942. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION DESIGNATING THE RECORD
NECESSARY FOR THE CONSIDERATION
OF THE APPEAL HEREIN

(Rule 19, Subdivision 6 of C. C. A., Ninth Circuit)

It is hereby stipulated by and between the parties hereto, through their respective counsel, pursuant to Rule 19, Subdivision 6, of the Rules of the Circuit Court of Appeals for the Ninth Circuit, that the record as designated in the stipulation filed in the District Court on the 16th day of January, 1942, and each and every part thereof, shall be and is hereby designated as the parts of the record necessary for the consideration of the appeal herein.

Dated this 24th day of January, 1942.

WM. FLEET PALMER,

United States Attorney,

DANIEL DILLON,

Attorney,

Department of Justice,

Attorneys for Appellant.

SYLVESTER HOFFMAN,

Attorney for Appellee.

[Endorsed]: Filed Jan. 26, 1942. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

AMENDMENT TO STIPULATION DESIGNATING THE RECORD NECESSARY FOR THE CONSIDERATION OF THE APPEAL
HEREIN

(Rule 19, Subdivision 6 of C. C. A., Ninth Circuit)

The stipulation heretofore filed is now amended to read that, it is hereby stipulated by and between the parties hereto, through their respective counsel, pursuant to Rule 19, Subdivision 6, of the Rules of the Circuit Court of Appeals for the Ninth Circuit, that the record as designated in the stipulation filed in the District Court on the 16th day of January, 1942, and each and every part thereof, shall be and is hereby designated as the parts of the record necessary for the consideration of the appeal herein, except that it is now stipulated that no more of the deposition of Richard B. Posey, on behalf of the defendant, be printed than now appears in the reporter's transcript of the evidence, as read in evidence at the trial.

Dated this 10th day of March, 1942.

WM. FLEET PALMER,
United States Attorney,
DANIEL DILLON,
Attorney,
Department of Justice,
Attorneys for Appellant.
SYLVESTER HOFFMAN,
Attorney for Appellee.

[Endorsed]: Filed March 11, 1942. Paul P. O'Brien, Clerk.

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 1100-O'C-Civil

ROSETTA ALICE KELLEY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

STIPULATION AS TO CORRECTION OF RECORD
ON APPEAL (RULE 75(H), FEDERAL
RULES OF CIVIL PROCEDURE)

It is hereby stipulated by and between the parties hereto, that the transcript of record upon appeal from the District Court of the United States for the Southern District of California, Central Division, to the United States Circuit Court of Appeals for the Ninth Circuit, is in error and is not correct; that the stipulation as to the record of appeal heretofore filed in this court provides for the "reporter's complete transcript of all proceedings" and that on page 164 of the printed transcript of record, there appears only the words "court's instructions to the jury" and that the instructions to the jury given by the court are not set forth in said transcript of record, as set forth in said stipulation, and that in that respect the reporter's transcript is not complete. That the in-

clusion of the instructions to the jury is material to the plaintiff and appellee and to the presentation of the case by said plaintiff and appellee in the said Circuit Court of Appeals.

It is further stipulated that the above entitled court direct that the said omissions be corrected and the preparation of a supplemental record or transcript of record, consisting of the instructions of the court to the jury in the above entitled cause, and that the same be certified and transmitted by the Clerk of the above entitled District Court and that the reporter be authorized and directed to prepare and transcribe, forthwith, that portion of the proceedings not heretofore transcribed, to-wit: the instructions of the court to the jury in the trial of the above entitled cause.

Dated: April 6th, 1942.

WM. FLEET PALMER

United States Attorney

DANIEL DILLON

Attorney, Dept. of Justice

Attorneys for Defendant and Appellant

SYLVESTER HOFFMANN

Attorney for Appellee and Plaintiff

Good cause appearing therefor, it is so ordered.

Dated: April 7, 1942.

J. F. T. O'CONNOR

Judge, United States District
Court

A true copy, attest, etc., Apr. 22, 1942.

(Seal)

R. S. ZIMMERMAN,

Clerk,

U. S. District Court, Southern
District of California,

By EDMUND L. SMITH,

Deputy.

[Endorsed]: Filed Apr. 8, 1942.

[Title of District Court and Cause.]

COURT'S INSTRUCTIONS TO THE JURY

The Court: Gentlemen of the jury, it becomes my duty as judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case and to consider the evidence for that purpose.

This is an action brought by Rosetta Kelley against the Government of the United States. The action is brought under the War Risk Insurance Act of November 6, 1917, and the World War Veterans Act of June 7, 1924, and is based on the life

insurance policy issued to Thomas J. Kelley, deceased. That part of the complaint is admitted by the Government. The complaint further alleges that while T. J. Kelley was in the armed forces he obtained a \$10,000 policy and paid the premiums through January 1919; and that is admitted by the Government;

That on March 15, 1932, T. J. Kelley obtained a \$5,000 policy pursuant to Section 510 of the Veterans Act, and that the plaintiff was named beneficiary. Plaintiff alleges that the premiums were paid when due through August 1935 on said policy; and there are certain stipulated facts which are to be taken by you as proved. It is admitted by the defendant that Thomas Joseph Kelley applied and was issued a policy of insurance whereby the defendant agreed to pay Rosetta Alice Kelley, his wife, who is the plaintiff in this [87] action and the beneficiary named in the policy, the sum of \$5,000 in the event that the insured died while the policy was in force. It is also admitted that Mr. Kelley paid all the premiums at the rate of \$15.05 per month on the policy from the date of issuance until he died on August 10, 1935; and that the policy was in full force by reason of the payment of premiums on the date of his death.

The complaint further alleges that between the insured's death and October 6, 1936, plaintiff applied for benefits under this policy, and that the Director of Insurance, H. L. McCoy, denied liability. The plaintiff appealed to the Administrator

of Veterans Affairs who denied the appeal on January 22, 1936, a disagreement existing between the parties over the \$5,000 benefits.

The allegation is denied but the answer admits that on August 26, 1935, the plaintiff filed in the Veterans Administration a claim for payment to her of the proceeds of the policy of insurance; that on August 29, 1935, the Director of Insurance of the Veterans Administration decided that the insurance was not payable to the plaintiff because T. J. Kelley withheld information, material information, and made fraudulent representations as to health and treatment by physicians; and that the plaintiff was so notified on August 29, 1935; and on January 28, 1936, plaintiff appealed, and the decision was affirmed, and the plaintiff was so notified on October 26, 1936. [88]

The complaint further alleges that T. J. Kelley performed all of the things to be done on his part; that between August 10, 1935, and October 6, 1936, plaintiff made due proof to defendant of the right to benefits; and that is denied in the answer.

The Government sets up an affirmative defense. The affirmative defense, briefly, is as follows: The Government alleges that on March 15, 1932, T. J. Kelley applied for a life policy under Section 310 of the Veterans Act, and in the application he represented that he had never been treated for diseases of the heart, blood vessels or genito-urinary organs; that he had not been ill nor consulted a physician

since the date of his discharge, except for a hemorrhoidectomy in September 1920; and that he further represented that he had never had syphilis.

Relying upon the representations, the Veterans Administration issued him a policy for \$5,000.

The answer further alleges that these representations were untrue and fraudulent; and that the applicant had applied for disability compensation on September 3, 1931, representing that he had heart trouble, rheumatism and spinal trouble, and had been examined by physicians of the Veterans Administration on October 28, 1931, at which time he had syphilis and aortitis. He was notified on November 17, 1931, of his chronic aortitis;

Stating further in the answer that he had consulted a [89] physician in September 1930 and in March 1931; despite the representations of good health, the applicant was not in good health on March 15, 1932.

The answer further alleges that the applicant, T. J. Kelley, well knew that he was not in good health, and he misrepresented his condition with intent to deceive the defendant and to procure an insurance policy; that if a full disclosure of the facts had been made, defendant would not have issued the policy.

I charge you, gentlemen, that these are allegations that I have read to you both from the complaint and the answer, and the affirmative defense that the Government sets forth in its answer; and I charge you that with reference to the defense

which is interposed here by the Government, it is necessary that the Government establish those facts and has the burden of proof in so doing.

In judging the credibility of the witnesses, you shall have in mind the law that a witness is presumed to speak the truth. This presumption, however, may be overcome by contradictory evidence, by the manner in which the witness testifies, by the character of his testimony, or by evidence pertaining to his motives. A witness false in one part of his testimony is to be distrusted in others; that is to say, you may reject the whole testimony of a witness who wilfully has testified falsely as to a material point, unless from all the evidence you shall believe that the probability [90] of truth favors his testimony in other particulars.

You are not bound to decide in conformity with the testimony of a number of witnesses which does not produce conviction in your mind as against the declaration of a lesser number or a presumption or other evidence which appeals to you with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses but in the relative convincing force of the evidence. The testimony

of one witness entitled to full credit is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony even if a number of witnesses have testified to the contrary, if, from the whole case, considering the credibility of the witnesses and after weighing the various factors of evidence, the jury should believe that there is a balance of probability pointing to the accuracy and honesty of the one witness.

Any evidence that has been received of an act, omission or declaration of a party which is unfavorable to his own interest should be considered and weighed by you like any other admitted evidence; but evidence of the oral admissions [91] of a party other than his own testimony in this trial ought to be viewed by you with caution.

You shall not consider as evidence any statement of counsel made during the trial unless such statement was made as an admission or stipulation conceding the existence of a fact or facts.

You must not consider for any purpose any evidence offered and rejected, or which has been stricken out by the Court. Such evidence is to be treated as though you had never heard it. You are to decide this case solely upon the evidence that has been admitted by the Court and the inferences that you may reasonably draw therefrom and such presumptions as the law may deduce therefrom and as directed in my instructions and in accordance with the law as I state it to you. If in these in-

structions any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me and none must be inferred by you. For that reason you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and to regard each in the light of all the others.

While it is incumbent upon one who asserts the affirmative of an issue, thus having the burden of proof, to prove his allegations by the preponderance of the evidence, this rule does not require demonstration, that is, such degree of proof as, excluding the possibility of error, produces [92] absolute certainty, because such proof is rarely possible.

In a civil action such as the one we are now trying, it is proper to find that a party has succeeded in carrying his burden of proof on an issue of fact if the evidence favoring his side of the question is more convincing than that tending to support the contrary side; and if it causes the jurors to believe that on that issue the probability of truth favors that party.

At times throughout the trial the Court has been called upon to pass on the question as to whether or not certain offered evidence might properly be admitted. With such rulings and the reasons for them you are not to be concerned. Whether offered evidence is admissible is purely a question of law, and from a ruling on such a question you are not

to draw any inference as to what weight should be given to the evidence or to the credibility of the witness. In admitting evidence to which an objection is made, the Court does not determine what weight should be given to such evidence. As to any offer of evidence that was rejected by the Court, as to which objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

In civil actions the party who asserts the affirmative of an issue must carry the burden of proving it. In other words, the burden of proof as to that issue is on that party. This means that if no evidence were given on either side to [93] such issue, your finding as to it would be against that party. When the evidence is contradictory, the decision must be made according to the preponderance of the evidence, by which is meant such evidence as when weighed with that opposed to it has more convincing force and from which it results that the greater probability of truth lies therein. Should the conflicting evidence be evenly balanced in your minds so that you are unable to say that the evidence of either side of the issue predominates, then your finding must be against the party carrying the burden of proof, namely, the one who asserts the affirmative of that issue.

Whenever in my instructions I state that the burden or the burden of proof rests upon a certain party to prove a certain allegation made by him, the meaning of such an instruction is this: that

unless the truth of that allegation is proved by a preponderance of the evidence, you shall find the same not to be true.

The term "preponderance of evidence" means such evidence as when weighed with that opposed to it has more convincing force and from which it results that the greater probability of truth lies therein.

Evidence may be either direct or indirect. Direct evidence is that which proves a fact in dispute directly without an inference or presumption and which in itself, if true, conclusively establishes the fact.

Indirect evidence is that which tends to establish a [94] fact in dispute by proving another fact which, though true, does not of itself conclusively establish the fact in issue but which affords an inference or presumption of its existence.

Indirect evidence is of two kinds, namely, presumptions and inferences. A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it must be corroborated by other evidence, direct or indirect; but unless so corroborated, the jury is bound to find according to the presumption.

An inference is a deduction which the reason of the jury draws from the facts proved. It must be founded on a fact or facts proved and be such a deduction from those facts as is warranted by a consideration of the usual propensities or passions

of men, the particular propensities or passions of the person whose act is in question, the course of business or the course of nature. The word "propensity" as used in these instructions means any natural or habitual inclination or tendency.

The rules of evidence ordinarily do not permit the opinion of a witness to be received in evidence. An exception to this rule exists in the case of expert witnesses. A person who, by education, study and experience, has become an expert in any art, science or profession and who is called as a witness, may give his opinion as to any such matter in [95] which he is versed and which is material to the case.

As to the opinion of expert witnesses, you may exercise an independent judgment in determining how far you will follow the opinions expressed, the credibility of the witness, and the weight to be given to his testimony, or what weight to give to the opinions of any one or more of the expert witnesses in the event of conflicting opinions.

The facts in a hypothetical question directed to an expert witness are presumed to be true for the purpose of asking the question only and for no other purpose. The opinion of the expert witness must therefore be brought to the test of the facts in order that the jury may judge what weight his opinion is entitled to receive. The truth or falsity of the purported facts included in the hypothetical question is a question for the jury to determine. The opinion can have little, if any, value or weight

unless the material facts assumed in such hypothetical question are substantially true.

You are instructed that as to the opinion of an expert witness you may exercise an independent judgment in determining how far you will follow the opinions expressed, the credibility of the witness, and the weight to be given to his testimony, or what weight to give to the opinion of any one or more of the expert witnesses, in the event of conflicting opinions, is solely for your determination.

Expert testimony is only an aid to the solution of the [96] main issue. You may follow your own convictions based upon your own experience, observations and common knowledge, although contrary to the expert's opinion evidence.

Fraud is never presumed. It is presumed that the answers of the insured were true. The burden is on the defendant to show that the answers made by the insured in his application were false by clear, cogent, convincing and satisfactory proof.

Where the evidence gives equal support to each of two inconsistent inferences, that is, to that of innocence and to that of fraud or wrongdoing, then it is your duty to find in favor of innocence and against the claim of fraud.

If evidence containing inconsistencies and incongruities is reconcilable, the presumption of innocence and fair dealing will impute the variance to misconception or mistake rather than to a wilful and corrupt misrepresentation.

A presumption is evidence and remains as evidence in this case until the rebutted by a preponderance of contrary evidence, which must be weighed and determined by you gentlemen of the jury and disappears only if the defendant produces sufficient evidence to preponderate against it.

It is presumed that the insured, Thomas Joseph Kelley, was innocent of crime or wrongdoing and that all his transactions with the Veterans Administration were fair and regular; it is also presumed that the answers of the insured [97] as made in his application were true and correct.

The question is not whether the insured had a heart ailment or any other disability or disease at or prior to the time he made written application for the policy sued upon, but whether he knew he had such diseases or disabilities, and made knowingly false answers as to whether or not he had any of the diseases or disabilities which, in his application, he denied having at that time. And even if you find from the preponderance of the evidence that he had one or more diseases at that time, you will find for the plaintiff and against the defendant on that issue unless you also find that the insured knew that he then had such diseases and that his answers, as made in the application, were knowingly false, when made by him.

The term "goodhealth" as used in the application for insurance must be considered not in the light of scientific technical definitions, but as the

term is ordinarily used and understood. Perfect health is not required.

The statements made by the insured in his application for the policy here sued upon were representations as distinguished from warranties. A misrepresentation will not constitute a defense to an action on a policy unless it was intentionally untrue or was made with a reckless disregard for its truth or falsity.

Whether or not the insured made inconsistent claims or statements as to his condition of health, or of other facts [98] material to the risk to be assumed by the insurer in issuing the policy, if true, is not of itself fatal to the right of the plaintiff, his surviving beneficiary, to recover under the policy. It is for you gentlemen of the jury to determine which, if any, of said statements were true and which, if any, were false, and which, if any, although false, were made with the intent to defraud, and which, if any, were intentionally and knowingly made with reckless disregard of the truth.

You are instructed that if the insured intentionally made a false statement in his own behalf to secure an advantage over the Government of the United States, he cannot be heard to say that the Government did not rely upon his statements. He was required, both by law and by regulations of the department, to make a showing as to his health at the time of his application.

You are instructed that the Government is not bound by the knowledge of its officers and agents.

You are instructed that the knowledge that the physicians connected with the Veterans Bureau obtained in investigating the compensation claim of this insured, though their reports be in the file concerning that claim, that this knowledge is not to be imputed to the Director in passing on the application of the insured, as a matter of law.

You are instructed that a material fact is a fact the knowledge or ignorance of which would naturally influence [99] the insurer's judgment in making the contract, in estimating the degree and character of the risk, or in fixing the rate of insurance.

Incorrect statements in the application for insurance of material representations, if known to be untrue by the insured when made, and nothing else appearing to contradict this, invalidates the policy without further proof of actual conscious design to defraud.

The statement of the insured in his application for insurance that he had not been treated for diseases of the enumerated parts of the body was a representation that would constitute a defense to this action if you find from a preponderance of the evidence that it was intentionally untrue or made with a reckless disregard for its truth or falsity.

The purpose of propounding questions of the kind under consideration and of securing answers

to them is to elicit relevant and material information which may not be disclosed by the medical examination. Such information may well furnish the basis for determining whether further examination or inquiry should be made; and that being its function, it will be presumed that the Government took it into consideration and relied upon it in the issuance of the policy. An untrue representation of that kind knowingly made is material as a matter of law without proof, and its submission implies an intent to deceive.

When the physical facts admitted as evidence in this [100] case positively contradict the statement or statements of witnesses, then the physical facts must control and the jury cannot disregard them.

Although as men you may sympathize with those who suffer, yet, as honest men bound by oath to administer judgment according to law and evidence, you should not act upon your sympathies without any proof. Therefore, motives of sympathy for the insured are not to be considered by you in any degree in arriving at your verdict in this case. Likewise, the fact that the insured may have rendered patriotic service to our country during the World War is not to be considered by you in any respect in arriving at your verdict in this case. You must be just to the plaintiff and equally just to the Government. As upright men charged under oath with the responsible duty of assisting the Court in the administration of justice, you will put aside all

sympathy and sentiment and look steadfastly to the law and the evidence in the case and return into court such a verdict as is warranted by the law and the evidence.

The attitude and conduct of jurors at the outset of their deliberations are a matter of considerable importance. It is rarely productive of good for a juror upon entering the jury room to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense of pride may be aroused, and he may hesitate to re- [101] cede from an announced position if and when shown that it is fallacious. Remember that you are not partisans or advocates in this matter, but you are judges. The final test of the quality of your service will lie in the verdict which you return to this courtroom—not in the opinions any of you may hold as you retire.

Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case. To that end the Court would remind you that in your deliberations in the jury room there can be no triumph excepting the ascertainment and declaration of the truth.

You are instructed that if the Judge has said or done anything which has suggested to you that he is inclined to favor the claim or position of either party, you will not suffer yourselves to be influ-

enced by any such suggestion. I have not expressed nor intended to express, nor have I intimated or intended to intimate, any opinion as to what witnesses are or are not worthy of credulity; what facts are or are not established; or what inferences should be drawn from the evidence adduced. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you disregard it. It is your duty as jurors to consult with one another and to deliberate with a view of reaching an agreement, if you can do so without violence to your individual judgment. To each of you I [102] would say that you must decide the case for yourself; but you do so only after a consideration of the case with your fellow-jurors; and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in one way on any question submitted to you by the single fact that a majority of the jurors or any of them favor such a deliberation or decision. In other words, you should not surrender your honest conviction concerning the effect or weight of evidence for the mere purpose of returning a verdict, or solely because of the opinion of the other jurors.

Upon retiring to the jury room you will select one of your number to act as foreman who will preside over your deliberations and who will sign the verdict to which you all agree.

This is a civil action. As soon as all of you shall have agreed upon a verdict, you shall have it signed by your foreman and dated, and then you shall return into this courtroom.

You should not be concerned in your deliberations at all with any compensation of the attorney. That is entirely a matter for the Court, in the event any compensation were allowed.

Mr. Dillon: Exception to the last instruction, your Honor.

(Whereupon, at 2:45 o'clock p. m., the jury retired to the jury room for their deliberations.)

[Endorsed]: Filed Apr. 22, 1942. [103]

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10027

Appeal from the U. S. District Court, Southern
District of California, Central Division,
No. 1100-O'C-Civil.

UNITED STATES OF AMERICA,

Appellant,

vs.

ROSETTA ALICE KELLEY,

Appellee.

STIPULATION FOR SUPPLEMENTAL TRAN-
SCRIPT OF RECORD ON APPEAL (Rule 19)

Whereas, pursuant to stipulation of the parties, and an order of the U. S. District Court, Southern District of California, Central Division, the reporter has prepared a supplemental Transcript of the record of the trial of the above-entitled cause, being a portion omitted from the Transcript of Record filed with the Clerk of the above-entitled Circuit Court of Appeals, being the instructions of the trial judge to the jury in said cause, and

Whereas, in printing the Transcript of Record, parts of the deposition of Richard B. Posey was omitted therefrom, which said parts were introduced into evidence and do not appear in said Transcript (R. 90-107), and

Whereas, the aforesaid Jury Instructions and the parts of the deposition of said Posey so omitted,

are material and necessary for the consideration of the appeal, and the Appellee considers the omission thereof to be of substantial prejudice to her, upon this appeal, and that without such parts, a material part of the record has not been printed,

Now, Therefore, It Is Hereby Stipulated by and between the parties that the Clerk shall cause to be printed a Supplemental Transcript of the record, to include

- (1) The trial court's instructions to the jury;
and
- (2) The entire deposition of Richard B. Posey, including the exhibits attached thereto or referred to in said deposition, other than those portions heretofore incorporated in and printed in the transcript of Record in this cause, pages 90 to 107, inclusive.

It Is Further Stipulated that the above-entitled Circuit Court of Appeals shall consider that the entire jury instructions, so included, were given to the Jury, without objection, and that the entire deposition of said Posey, and the exhibits attached thereto or referred to in said deposition, were introduced in evidence, without objection, except as to those portions withdrawn in open Court, during the trial of said cause, and except as to those portions thereof as to which objections were made thereto, during the trial of said cause, as set forth in the Transcript of Record in this cause, pages 90 to 107, inclusive. And that the Transcript of Record now on file and said additional parts of the

record, as aforesaid, to be printed as a supplemental transcript, shall be and are hereby designated as the parts of the record necessary for the consideration of the appeal herein.

Dated: May 6, 1942.

WM. FLEET PALMER

U. S. Attorney

DANIEL DILLON

Atty., Department of Justice

Attorneys for Appellant

SYLVESTER HOFFMAN

Attorney for Appellee

[Endorsed]: Filed May 11, 1942. Paul P. O'Brien,
Clerk.

In the District Court of the United States in and
for the Southern District of California, Central
Division.

No. 1100-B-Civil

ROSETTA ALICE KELLEY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Washington, D. C.

Thursday, May 15, 1941.

DEPOSITION OF RICHARD B. POSEY,

a witness of lawful age, taken on behalf of the defendant in the above-entitled cause, wherein Rosetta

Alice Kelley is the plaintiff and the United States of America is the defendant, pending in the District Court of the United States in and for the Southern District of California, Central Division, pursuant to the notice hereto annexed, before Lloyd L. Harkins, a notary public in and for the District of Columbia, at Room 304, Columbian Building, 416 Fifth Street, N.W., Washington, D. C., at 10 o'clock a. m., on Thursday, May 15, 1941.

Appearances

On behalf of the Plaintiff:

Warren E. Miller

On behalf of the Defendant:

William T. Becker [2*]

RICHARD B. POSEY,

a witness of lawful age, was thereupon duly sworn, and, being examined by counsel, testified as follows:

Direct Examination

By Mr. Becker:

Q. Will you state your name, please?

A. Richard B. Posey.

Q. What is your business or profession, Mr. Posey?

A. I am an employee of the Government, the Veterans Administration.

[*Page numbering appearing at top of page of original Reporter's Transcript.]

(Deposition of Richard B. Posey.)

Q. How long have you been employed by the Veterans Administration?

A. With the Veterans Administration and predecessors since June 10, 1918.

Q. In what branch or bureau of the Veterans Administration are you employed?

A. I am with the Insurance Service, have always been in the Insurance Service.

Q. In what capacity are you employed in the Insurance Service, Mr. Posey?

A. I am advisor on insurance matters to the Director of Insurance, and anyone in the Bureau, and folks outside the Veterans Administration, the various departments. I frequently advise the folks in the War Department, the Navy Department, Coast Guard.

Q. And pursuant to a notice to take this deposition of H. L. McCoy, Director of Insurance of the Veterans Administration, or such officer or employee as he may designate, were you designated by Mr. McCoy to represent the Director of Insurance [3] in the giving of this deposition? A. I was.

Q. Now, during your long service with the Veterans Administration have you become familiar with the regulations and procedure, both written and those formed by administrative practice, in regard to the reinstatement and the granting of policies of insurance? A. I have.

Q. Subsequent to July 2, 1927, what was necessary for a man to secure a policy of United States

(Deposition of Richard B. Posey.)

Government life insurance, his policy having previously lapsed after his discharge from the military service?

Mr. Miller: I object to that for the reason that it is a matter of law, and the law speaks for itself.

A. From July 2, 1927, there was no yearly renewable term insurance reinstated, but on May 29, 1928, an act was passed, Section 310 of the World War Veterans Act, as amended, which provided for granting insurance to those who were ever entitled or who had ever applied for yearly renewable term insurance while in the Service. The right to insurance under this was conditioned upon proof of good health, satisfactory to the Administrator.

Mr. Miller: I move to strike the answer for the reason assigned in the objection.

By Mr. Becker:

Q. Mr. Posey, under the procedure of the Veterans Administration, when a man applies for compensation what office is that application for compensation filed in?

A. Usually the regional office or facility in the field. [4]

Q. Now, assuming that the man was a resident, at the time he applied for compensation, of California, where would the application be sent?

A. Either Los Angeles or San Francisco.

Q. Would the Insurance Service of the central office have any knowledge as to this application for compensation?

(Deposition of Richard B. Posey.)

A. They would eventually get the number, C number assigned in that case, but they might not receive the files for a long period of time. They might remain in the field indefinitely.

Mr. Miller: I move to strike that portion of the answer starting with, "but they might not receive the files for a long period of time. They might remain in the field indefinitely," for the reason that it is highly speculative.

By Mr. Becker:

Q. Mr. Posey, what is the generally accepted definition of good health?

Mr. Miller: I object to the question as vague, indefinite, and uncertain.

Mr. Becker: I shall reframe the question.

By Mr. Becker:

Q. Mr. Posey, what is the generally accepted definition of good health, as interpreted by the Insurance Service of the Veterans Administration?

Mr. Miller: I object to the question for the reason that it is irrelevant, immaterial, and incompetent.

A. We have a definition by regulation which is rather long, but the common-sense everyday definition is what it means: free from injury or disease.

Mr. Miller: I move to strike the answer for the reason [5] assigned in the objection.

By Mr. Becker:

Q. And then, under the regulations or procedure of the Veterans Administration, before a man would

(Deposition of Richard B. Posey.)

be entitled to have United States Government life insurance granted to him subsequently to July 2, 1927, under the provisions of Section 310 he would have had to have been free from injury or disease at the time the insurance was granted?

Mr. Miller: I object to the question as leading.

A. He would have to have been in good health.

Mr. Miller: I move to strike the answer for the reason assigned in the objection.

By Mr. Becker:

Q. Is there a written or printed form of application that the Veterans Administration uses for the securing of this insurance? A. There is.

Mr. Becker: Mark this for identification, Defendant's Exhibit 1.

(Photostatic copy of document, consisting of four sheets, was marked Defendant's Exhibit No. 1 for identification.)

[Printer's Note: Defendant's Exhibit No. 1 is here omitted as it is already set out as Defendant's Exhibit A at page 58 of this printed record.]

By Mr. Becker:

Q. I hand you a photostat and ask you if you can identify that, as to what it is.

A. This is an application for insurance, on Form 739.

Mr. Becker: I now introduce into evidence photostat of application for United States Government life insurance, dated March 15, 1932, and signed by

(Deposition of Richard B. Posey.)

Thomas Joseph Kelley, the original [6] of which is believed to be in the possession of the United States Attorney and will be substituted for this photostat when the deposition is read in court.

Mr. Miller: I object for the reason that the same is irrelevant, incompetent, and immaterial, and has not been properly identified.

By Mr. Becker:

Q. Mr. Posey, I hand you this application and ask if the application contains a question relative to the filing of a claim for compensation.

Mr. Miller: I object to the question for the reason that the question is based on incompetent evidence; and at this time, in order to save the costs of taking this deposition, I ask that this be considered a continuing objection to all further questions asked by counsel for the defendant based on this record.

I further object to the question for the reason that the record, if admissible, speaks for itself.

A. It does have such a question.

Mr. Miller: I move to strike the answer for the reasons assigned in the objection.

By Mr. Becker:

Q. Would you read into the record the question and the answer of the applicant for the insurance to that question?

Mr. Miller: I object: irrelevant, immaterial, incompetent, not the best evidence, hearsay.

A. The question is No. 13 and is subdivided.

(Deposition of Richard B. Posey.)

First, "Have you ever applied for Government compensation?" The answer is "No." [7]

"Training allowance?" The answer is "No."

"Government insurance?" The answer is "No."

"Pension?" The answer is "No."

"If so, give reference numbers." The answer to that is three X's.

Mr. Miller: I move to strike the answer for the reasons assigned in the objection.

By Mr. Becker:

Q. Mr. Posey, assuming that as a fact the applicant for insurance had filed Form 526, a claim for compensation, on August 31, 1931, would the Insurance Service, under its practice and procedure, have made further inquiry before this insurance was granted, to determine what if any disability that claim was based upon?

Mr. Miller: I object for the reason that the question is vague, indefinite, and uncertain; for the further reason that this witness was not engaged in work at the time that the alleged application, which is marked Defendant's Exhibit No. 1, was acted upon; and that the question asks for hearsay testimony because of the fact that this witness is being asked what someone else would have done or would not have done so far as making inquiry is concerned; and that it is impossible for this witness to state what someone else would have done or would not have done, as asked in the question. All he can give is his idea of what somebody else might or might not do.

(Deposition of Richard B. Posey.)

Mr. Becker: Would you reread the question, please?

(The pending question, as above recorded, was read aloud by the reporter.)

Mr. Miller: And the further objection is made for the [8] reason that the question is too speculative.

Mr. Becker: Let me rephrase that question, as follows:

Q. Mr. Posey, assuming that as a fact the applicant for insurance had filed Form 526, a claim for compensation, on August 31, 1931, would the Insurance Service have been required, under its practice and procedure, to make further inquiry before this insurance was granted, to determine what if any disability that claim was based upon?

Mr. Miller: I object to this question also, for the reasons assigned in the objection to the previous question, which will not here be repeated, for the sake of brevity.

A. No.

Mr. Miller: I move to strike the answer out for the reasons assigned in the objection.

By Mr. Becker:

Q. Did you want to make some further explanation of that answer?

A. I would say that the Insurance Service was authorized and instructed to rely upon the answers of the insured in his application.

(Deposition of Richard B. Posey.)

Mr. Miller: I move to strike the answer out for the reasons assigned in the objection.

By Mr. Becker:

Q. Now, Mr. Posey, on the application for insurance are there any questions contained therein relative to any diseases or disabilities from which this insured may have been suffering? If so, would you kindly read into the deposition the question and the insured's answer?

Mr. Miller: I object for the reason previously assigned [9] and for the further reason that the question is too speculative.

A. The first question, 21, under the title of "Applicant's Own Statement," on the medical examination, is, "What operations have you had? Describe fully, giving dates, also name and address of attending surgeon." The answer is, "Hemorrhoidectomy September, 1920. Complet"—no "e" on it—"Complet Recovery. Dr. Guy Cochran, Los Angeles."

Next question is No. 22, "Have you ever used wines or liquors to excess?" The answer is "No."

Question 23, "Have you ever used opium, morphine, cocaine, or other habit-forming drugs?" The answer is "No."

"What is your occupation?" Railroad fireman.

25, "Are you now in good health?" Answer, "Yes."

27, "Have you been ill, or contracted any disease, or suffered any injury, or been prevented by rea-

(Deposition of Richard B. Posey.)

son of ill health from attending your usual occupation, or consulted a physician in regard to your health, since date of discharge? (Answer 'Yes' or 'No.')

The answer is "Yes." "If so, give dates and full particulars, including the name and address of physician." The answer is "Hemorrhoidectomy September 1920. No after trouble. See above." He has this same answer above.

Mr. Miller: I move to strike the answer for the reasons assigned in the objection.

By Mr. Becker:

Q. Now, are there any further questions on that application form relative to whether or not this applicant had suffered from any specific disease or diseases?

Mr. Miller: I object to the question for the reason previously given, and further for the reason that the question [10] is too speculative and calls for the conclusion of the witness.

A. Yes.

Mr. Miller: I move to strike the answer for the reasons assigned in the objection.

By Mr. Becker:

Q. What are the questions and answers as shown on the application form?

Mr. Miller: Same objection.

A. Question 40, "Has applicant ever had syphilis, gout, or rheumatism? (State which)." Answer is "No."

(Deposition of Richard B. Posey.)

Question 41, "Any defects in the sight or hearing?" The answer is "No."

42, "Any deformity or departure from normal in any respect? No."

43, "Has the applicant lost an eye, hand or arm,"——

Mr. Miller: I move to strike the answer for the reasons heretofore assigned.

By Mr. Becker:

Q. Mr. Posey, referring back to the second page of the application, under "Applicant's Own Statement," does the application there show any statements by the insured as to whether or not he has suffered from any particular disease or diseases?

Mr. Miller: I object to the question for the reason previously given, and further for the reason that the question is too speculative and calls for the conclusion of the witness.

A. Question 26.

Mr. Miller: I move to strike the answer for the reasons assigned in the objection. [11]

By Mr. Becker:

Q. Would you read question 26 and the applicant's answer thereto into the record, please?

Mr. Miller: I object to the question for the reason previously given.

A. "Have you ever been treated for any disease of brain or nerves?" Answer, "No."

"Throat or lungs?" Answer, "No."

"Heart or blood vessels?" Answer, "No."

(Deposition of Richard B. Posey.)

“Stomach, liver, intestines?” Answer, “No.”

“Kidney or bladder?” Answer, “No.”

“Genito-urinary organs?” Answer, “No.”

“Skin?” Answer, “No.”

“Glands?” Answer, “No.”

“Ear or Eye?” Answer, “No.”

“Bones?” Answer is “No.” That is the end of the answer to that question.

Mr. Miller: I move to strike the answer for the reasons assigned in the objection.

By Mr. Becker:

Q. Mr. Posey, in your experience in the insurance service of the Veterans Administration have you, as a layman, learned what the disease of aortitis is?

Mr. Miller: I object to the question: irrelevant, immaterial, incompetent, and this witness has not been shown to have sufficient experience to answer the question. It is a question of medicine.

A. I have known that it was a heart disability a long time before I came to the Bureau. I was with a private company [12] in Indianapolis, Indiana, and I knew that it was a heart disability.

Mr. Miller: I move to strike the answer for the reasons assigned in the objection and for the further grounds that it is hearsay.

By Mr. Becker:

Q. By “private company” you mean a private insurance company?

Mr. Miller: Same objection.

(Deposition of Richard B. Posey.)

A. Yes.

Mr. Miller: I move to strike the answer for the reasons assigned.

By Mr. Becker:

Q. Mr. Posey, if it is shown by the records and on the trial of this case that this insured was examined on October 28, 1931, and at that time was diagnosed as suffering from "aortitis, chronic mild, with good cardiac tolerance," and had he made that known to the Veterans Administration in this application for insurance in 1932, would this insurance, under the regulation and procedure of the Veterans Administration, have been granted?

Mr. Miller: I object to the question.

By Mr. Becker:

Q. Or could it have been granted, under the regulation and procedure of the Veterans Administration?

Mr. Miller: I object to the question, first, for the reason that it is speculative; second, for the reason that no knowledge on the part of the insured appears as of record as to what he was suffering from or what the result of his examination [13] was, if he was examined on October 28, 1931; for the further reason that the record does not show that he was so examined on such date; further, for the reason that the witness is being asked a question as to what somebody else would have done under certain circumstances, and the best evidence would be the tes-

(Deposition of Richard B. Posey.)

timony of the person who approved this insurance application, Dr. McIntyre; further, for the reason that the question calls for hearsay testimony, highly speculative testimony; and if there are any regulations that are applicable, they would be the best evidence, rather than the testimony of this witness, as to what the procedure would be.

A. I would say there was no one authorized to approve an application where it was shown that the man had a heart disability.

Mr. Miller: I move to strike the answer for the reasons assigned in the objection.

By Mr. Becker:

Q. Mr. Posey, referring again to the application for insurance, by whom was that application approved?

Mr. Miller: Same objection previously to the whole line of testimony based on the evidence obtained in this Defendant's Exhibit No. 1; and when the words "Same objection" appear to the questions heretofore asked, that is what is meant.

Mr. Becker: Let me ask this question:

Q. Would you read into the record the stamp which appears on the last page of the application, showing that it was acceptable under Section 310?

Mr. Miller: I object to the question. Same objection.

A. The application shows a stamp, "Acceptable under Sec- [14] tion 310. By Dr. A. J. McIntyre,

(Deposition of Richard B. Posey.)

Insurance Medical Section. Date 4/8/32," initialed by Dr. McKenzie.

By Mr. Becker:

Q. Were you acquainted with both Dr. McIntyre and Dr. McKenzie, Mr. Posey?

Mr. Miller: I object to the question as immaterial, irrelevant, and incompetent.

A. Yes, sir.

Mr. Miller: I move to strike the answer for the reasons assigned in the objection.

By Mr. Becker:

Q. Do you know whether Dr. McIntyre and Dr. McKenzie are now living or dead?

Mr. Miller: I object to the question.

A. They are both dead, been for a year or two.

Mr. Miller: I move to strike the answer.

By Mr. Becker:

Q. Assuming, Mr. Posey, that the applicant on October 30, 1931, was given a Wassermann test and showed a positive Wassermann, have you, in your experience with the Veterans Administration and as a layman, learned what a positive Wassermann indicates?

A. Yes. It indicates syphilis.

Q. Under the regulation and procedure of the Veterans Administration can a man who is shown to have had a positive Wassermann be granted insurance?

Mr. Miller: I object to the question for the rea-

(Deposition of Richard B. Posey.)

son that this witness is now being asked a question as to what some doctor would or would not do in passing a man for insurance, and clearly [15] he is being asked a question as to whether Drs. McIntyre or McKenzie would pass a person under these circumstances. Their testimony would be the best evidence on this point, and any regulations of the Veterans Administration would be the best evidence. In the absence of laying the proper foundation it is respectfully submitted to the Court that this witness' testimony is not admissible on this point, being hearsay, highly speculative, and otherwise, as apparent, irrelevant, immaterial, and incompetent.

A. I would say that no one was authorized to approve an application if it was known that the applicant had had syphilis at any time.

Mr. Miller: I move to strike the answer for the reasons assigned in the objection.

By Mr. Becker:

Q. Mr. Posey, are the Veterans Administration regulations and practice and procedure relative to the reinstatement or granting of insurance all in printed form, or have they been built up by custom?

Mr. Miller: Same objection.

A. We have regulations in printed form, but we also have practice that has grown up that is not in printed form.

Mr. Miller: I move to strike the answer.

(Deposition of Richard B. Posey.)

By Mr. Becker:

Q. And the practice as to the granting of insurance, is it or is it not almost entirely just a practice that has been built up and of which no printed regulations have been promulgated?

Mr. Miller: Same objection.

A. The only regulation is the one that defines good health— [16] I forget the number of that—but the practice has been to follow the authority in the law for the granting of insurance; and good health has been used to mean in the Bureau exactly what it says, that a man has no illness or disabilities.

Mr. Miller: I move to strike the answer.

By Mr. Becker:

Q. Then, the practice is that if a man has any illness or disability no insurance may be granted to him, under Section 310?

Mr. Miller: I object to the question as leading and for the reasons previously assigned.

A. There is no authority for granting the insurance, and any that is granted would be purely an error.

Mr. Miller: I move to strike the answer for the reasons assigned in the objection.

Mr. Becker: You may examine.

Cross Examination

By Mr. Miller:

Q. Mr. Posey, a man's condition at the time of making application for insurance is the criterion

(Deposition of Richard B. Posey.)

which determines whether or not it shall be granted to him, isn't it?

Mr. Becker: I want to object to the question unless it is confined to an application for reinstatement or granting of insurance under the provisions of Section 310 of the War Risk Insurance Act, it being admitted that there is a Section 304 which controls the granting of insurance to men suffering from a service-connected disability.

A. I think the criterion is the condition the man is in when he applies, but in determining that condition it is a well- [17] known practice among the medical folks generally that the history of the man's life and what illnesses he has had plays a large part in determining that present condition.

Mr. Miller: Without in any way waiving the objections made on direct examination, the following questions are asked this witness, should the objections made on direct examination not be sustained by the Court.

By Mr. Miller:

Q. Did you ever personally approve an application for reinstatement of insurance?

A. I don't believe I have, but I have been consulted on various times about the forms and what they should require and as to whether they ought to go into substandard business and take some of these folks, and we have discussed all of those things. Both of those doctors were calling on me for information.

(Deposition of Richard B. Posey.)

Mr. Miller: I move to strike that portion of the witness' answer after the word, "have" as not responsive.

By Mr. Miller:

Q. How do you know Dr. McKenzie is dead, if you know, other than from what someone told you?

A. I believe that my knowledge comes from a newspaper notice of death. That is my recollection.

Q. How do you know that Dr. McIntyre is dead?

A. I attended Dr. McIntyre's funeral.

Q. When you stated that no printed regulation has been promulgated, do you mean that no typewritten regulation or memorandum has been promulgated for the definition of good health, or you have just referred to the printed regulations promulgated by the administration? [18]

A. There is printed in the regulations or procedure somewhere a definition of good health. I forget just where it is. I would have to look it up if you want to know it exactly.

Q. Would it be possible for a person who had had syphilis and this condition to have cleared up to be granted insurance under Section 310?

A. It could be possible if it wasn't known, because the examination made many years afterwards might not disclose it.

Q. Many people have syphilis and don't know it, don't they?

A. Well, I think that is true. I believe that is true.

(Deposition of Richard B. Posey.)

Q. And when a man is examined by the Veterans Bureau, Doctor, based on your experience, do you know whether or not he is told the result of the examination?

A. I wouldn't like to say as to the practice. I know that in many cases they do tell them, especially where they know them real well, but I would not like to state what the practice is, because that is too extensive.

Q. Then, you are not in a position to state what the custom was at the place and time this man was examined?

A. No, I don't believe I could.

Q. Do you know what regulations were issued by the Veterans Administration with respect to informing claimants as to the results of their examinations by the doctors who made them, or by anyone else?

Mr. Becker: Objected to: irrelevant and immaterial, and it is a matter of law, not regulation.

A. We have regulations in regard to what information will be given a veteran, but I have never gone into it because it is [19] of no importance to our insurance.

By Mr. Miller:

Q. That is in the medical service?

A. Yes. More a matter of what is good for the veteran and what is good for the public.

Q. Do you know that in making examinations the typewritten report of the examination isn't com-

(Deposition of Richard B. Posey.)

pleted until after the examination and after the veteran has left the presence of the examiner?

A. You mean an examination, now, for insurance?

Q. An examination such as was made here on October 28, 1931.

A. I would say that ordinarily they are filled out before the man signs them. That is the rule. They should be.

Q. Did this man sign the examination of October 28, 1931?

A. Pardon me just a minute. You are speaking of the application?

Q. No. The October one, October 28, 1931.

Mr. Becker: I object to the question unless the examination or photostat thereof is exhibited to the witness, unless he has personal knowledge of it.

Mr. Miller: The last page.

Mr. Becker: Down at the bottom of the last page.

The Witness: No. I am looking at this. This is not an application for insurance (indicating).

Mr. Becker: He is talking about examination.

Mr. Miller: Examination.

The Witness: Well, this is signed by Thomas J. Kelley, the same signature that is on the other application. [20]

By Mr. Miller:

Q. What appears just over Mr. Kelley's signature, after the words, "Statement by Claimant"?

(Deposition of Richard B. Posey.)

Mr. Becker: Just a minute now. Objected to as irrelevant, immaterial, unless the examination report referred to is introduced into evidence at this time.

Mr. Miller: You may answer.

A. "Statement by Claimant," you want?

By Mr. Miller:

Q. Yes.

A. "My answers to question 9 have been read to me, and I hereby certify that the complaints therein recorded are all that I am suffering from to my knowledge."

Pardon me. This part in parentheses, do you want me to read that? It is awfully hard to read. Just "Examining physician will read." Do you want me to read that?

Q. Yes. "The examining physician will read complaints noted in answer to question 9 before the Claimant's signature is affixed"?

A. That is correct.

Q. And now will you read question 9 and the answers, which is referred to in that?

Mr. Becker: The same objection as to the previous question.

By Mr. Miller:

Q. "Present complaint."

A. (reading) Question 9. Present complaint. Subjective symptoms. Not diagnosed. See bottom of fourth page—I think. [21]

Q. Yes.

(Deposition of Richard B. Posey.)

A. (reading) This form for claimant's certification of fullness of answer to question 9. The examiner will acquaint the claimant with the requirement prior to noting complaints. Backache. That is the answer: backache.

Q. The answer to 9 is "Backache. Vision poor"?

A. "Backache. Vision poor."

Q. Yes. So all this claimant certified by his signature was what he was complaining about, on that; isn't that correct?

A. Well, Mr. Miller, now I wouldn't answer that because I haven't read all the form. Now, that form, I didn't go over that form until just now that you showed it to me, see.

Q. Well, what I mean is, this is all he said.

A. Sure.

Q. That's all he said was 9, see: "My answers to question 9." (exhibiting a document to the witness)

A. Well, that is calling for a conclusion.

Mr. Becker: I object to the question as calling for an opinion.

A. I'd say that his certification refers to question 9.

By Mr. Miller:

Q. Now, are you familiar with the procedure with regard to the assigning of C numbers or claim numbers, Mr. Posey? A. Yes, fairly so.

Q. Where was the number assigned in this case?

(Deposition of Richard B. Posey.)

A. I am not positive, but I assume it was assigned in the regional office.

Q. What is the procedure, or will you describe the procedure when a man makes an application for insurance, from the [22] time the number is first assigned to the claim, showing where the number is recorded and what is done with regard to the number?

Mr. Becker: Wait a minute. Objected to as irrelevant and immaterial, for the further reason that the C number may be assigned in connection with compensation and never come to the attention of the insurance service. Now you may answer.

A. Off the record, I want to be sure, Mr. Miller.

By Mr. Miller:

Q. Sure.

A. You are asking about a C number now? You are not talking about a claim for insurance benefits?

Q. No. C number.

A. Just the C number?

Q. C number on an application for compensation.

A. Well, the C numbers for compensation are frequently supplied in the regional office. Blocks of numbers are assigned to various offices, and they assign the C numbers; and, as I stated in the first part of the examination here, those numbers reach Washington—numbers do—and show that they have a C number, but the file itself might not reach Washington for a long while.

(Deposition of Richard B. Posey.)

Q. There is a master index card in Washington showing the names of the veterans for the C numbers? A. There is, yes, sir.

Q. For each C number, I had better say?

A. Yes, sir.

Q. And that information under the regulations is furnished to Washington—by “that information” I mean the [23] proper C number for a given name—promptly, is it not?

A. I should say so, yes.

Q. At the time this application for insurance in this case was approved, Defendant’s Exhibit No. 1, under the regulations there should have been an index card with this C number, 1783258, in the Washington office?

A. Yes. I am positive that that was a matter of record in the Washington office.

Q. The insurance medical section was in the Washington office at the time this application was located in the Washington office? A. Yes.

Q. What was the practice of the insurance service with respect to looking at this index card with the name of the applicant for insurance to determine whether or not he had applied for compensation?

Mr. Becker: I object to the question as irrelevant and immaterial, the question here in this case being whether or not the insured in his application made false and fraudulent statements.

(Deposition of Richard B. Posey.)

Mr. Miller: Will you read the question?

(The pending question was read aloud by the reporter.)

Mr. Miller: Previously applied for compensation.

A. It has never been the practice, was not then, to look into compensation files to find out what was the matter with a man if his health was good and the application was otherwise regular, which showed him to be in good health.

By Mr. Miller:

Q. By "otherwise regular" you mean the examining physician [24] whose report is attached to the application showed no bad health?

A. Showed no condition that would prevent him from being in good health.

Q. Well now, what——

A. Could I go a little further?

Q. Yes, surely.

A. It appears in this particular case that they did not draw the C file.

Q. Why do you say that?

A. There is no number—wait a minute. Pardon me. I am wrong on that. I am wrong. There is a C number on here. Now, whether that was put on afterwards or not, I don't know. Now, I can put that answer in, because I remember seeing the case go through, and from my own knowledge of the case I don't think they ever drew the C file. That is my impression, but I wouldn't say positively.

(Deposition of Richard B. Posey.)

Q. Yes. Defendant's Exhibit No. 1 for identification, consisting of four sheets, has on the first sheet C number 1783258, does it not?

A. It does.

Q. Now, do you know when that number was put on the application?

A. I do not, but it has all the appearances of having been put on in pencil after this application was received. I don't know when.

Q. It might have been put on there before April 5, 1932, might it not? A. Very likely.

Mr. Becker: I move to strike all of that as irrelevant [25] and immaterial.

By Mr. Miller:

Q. Now, the practice of the Veterans Administration is to maintain what is known as a "Central Office Dummy" File on all compensation cases, isn't it, Mr. Posey?

A. I would say on all C files.

Q. Yes, on C files.

A. Whether or not it was compensation or what-not.

Q. Yes. And this central office C file contains reports of physical examinations?

A. Sometimes.

Q. Carbons? A. Sometimes; not always.

Q. It also usually contains the ratings assigned by the adjudication officers?

A. My answer to that would be the same, that it sometimes contains quite a set of them, and some-

(Deposition of Richard B. Posey.)

times it won't have a single one, so it is not a file that we can depend on very well.

Mr. Becker: I object to the question and move to strike the answer on the ground that it is irrelevant and immaterial.

By Mr. Miller:

Q. But under the procedure the central office dummy file is supposed to contain a duplicate of the physical examination reports and the ratings, is it not?

A. Mr. Miller, I am not positive of that, that there is any regulation requiring that. I must say that you are getting into the compensation features now, and it is something I don't pay a lot of attention to.

Q. But you know of your own knowledge, and by having [26] handled these central office dummy files, that they do often contain carbons of the ratings made for compensation purposes and carbons of physical examination reports?

A. I'd say that is true: they do often contain them.

Q. And if the insurance medical section had looked at the "Central Office Dummy File" in the instant case, they would have seen whatever was in there as to ratings or physical examination reports?

Mr. Becker: Just a minute. Objected to.

A. Yes.

Mr. Becker: As irrelevant and immaterial and

(Deposition of Richard B. Posey.)

there being no showing that there was a duty on behalf of the insurance service to investigate or look into the compensation file of this veteran.

A. I would answer that, Mr. Miller, by saying that I question very much whether a dummy file had been made up in this case at the time this application for insurance came in.

By Mr. Miller:

Q. Why do you say that in this particular case, Mr. Posey?

A. Because the application for insurance followed so quickly after the claim for disability allowance. It was only a few months after, wasn't it?

Q. This one here is 4/5/32.

Mr. Becker: August 31, 1931, was the date of the claim.

By Mr. Miller:

Q. Well, assuming that the date of this man's claim, at which time the compensation number of C 1783258 was assigned to this case, was August 31, 1931, and this application for reinstatement of insurance was approved April 5, 1932, over seven [27] months later, would it not be possible that the rating and copy of physical examination report was in the central office dummy file on the latter date: that is, April 5, '32? Is it possible?

Mr. Becker: Just a minute, Mr. Posey. Objected to as irrelevant and immaterial and calling for speculation on the part of the witness.

A. I would say it is quite possible, and that if

(Deposition of Richard B. Posey.)

the award of benefits had been made out there it was quite probable it had been received by this time.

By Mr. Miller:

Q. Now, Mr. Posey, is there any way to tell, from the central office records here in Washington, as to when the central office dummy file in this case was made up? Or do you know?

A. You could from the C file, but I don't know whether we could tell when the central office dummy was made up from the records here at Washington. I am not positive as to that. I could tell you when C numbers are assigned where they are assigned in Washington; I can give you the very day.

Q. Can you state, Mr. Posey, when the central office first received information that C 1783258 had been assigned to the case of Thomas J. Kelley?

Mr. Becker: Objection as irrelevant and immaterial.

A. I cannot state when it was assigned, but it was a matter of record.

By Mr. Miller:

Q. In the central office?

A. In the central office when the application for insurance was received on March 29, 1932.

Q. Where is the central office dummy file in this case? [28]

A. I rather think it was with the C file in the field when this trial was about to take place.

(Deposition of Richard B. Posey.)

Q. And by that you mean with the Government attorney in charge of the defense of this suit?

A. I'd say yes.

Q. That is the practice, to send it there?

A. It is.

Q. When suit is filed, so all records will be there?

A. No, no. Practice for us to send it to the Department of Justice, to send all these files to the Department of Justice. They send them to their attorneys.

Q. Based on your experience in the Veterans Administration over all these years, can you state whether or not the central office dummy file or the C file in this case will show when the central office dummy file was first prepared?

A. I am not positive, but I rather think it could be ascertained, with those two files, when it was made up.

Q. Were there ways for disabled World War veterans to reinstate insurance other than under Section 310 of the World War Veterans Act, Mr. Posey, and what were they?

A. Well, Section 310 doesn't authorize any reinstatement. It authorizes the granting of new insurance.

Q. O.K. Well, then, let me repeat the question this way: Was it possible for disabled World War veterans to obtain United States Government life insurance in other manners than as provided in Sec-

(Deposition of Richard B. Posey.)

tion 310 of the World War Veterans Act of 1924, as amended?

Mr. Becker: Objected to as irrelevant and immaterial, it being a matter of law and admitted that under Section 304 of [29] the World War Veterans Act of 1924, as amended, World War veterans suffering from a service-connected disability of a degree less than permanent and total were entitled to a reinstatement of their insurance.

A. I would state that prior to July 2, 1927, they could reinstate yearly renewable term insurance under Section 304, the provisions of which are in that section, and after that period a man could reinstate a Government life-insurance policy that had lapsed, provided it hadn't been lapsed longer than two years.

By Mr. Miller:

Q. You mean under Section 304?

A. Under Section 304. And as has been stated by counsel, he only had to show that his disability that prevented him from being a good risk was service-connected and pay all premiums in arrears with interest, and also show that he was not totally and permanently disabled.

Q. Do you, Mr. Posey, know whether this veteran was suffering from a service-connected disability at the time he applied for his United States Government life insurance?

Mr. Becker: Objected to as irrelevant and immaterial, the policy having been granted under the

(Deposition of Richard B. Posey.)

provisions of Section 310 of the World War Veterans Act of 1924, as amended by the Act of May 29, 1928.

A. I don't know, Mr. Miller, whether or not what disability he had was connected with his service or not. I haven't looked into that part of it.

By Mr. Miller:

Q. Who determines under what section of the law the insured [30] is reinstated, whether under Section 304 or Section 310, the insured or the Veterans Bureau officials?

A. As I stated before, he doesn't reinstate insurance under 310.

Q. Well, I beg your pardon.

A. He buys new insurance under that, and he has to show good health and pay the premiums. That's all there is to it. There isn't a question of any arrears. It's a question of current premiums; that's all. Under 304 it would be necessary for some board having charge of the compensation feature to ascertain whether or not he had a service-connected disability.

Q. Then it would be the Bureau's—that is, the Government's—representative who would determine whether he would be entitled to apply for insurance under Section 304 or not?

A. He can't apply for insurance now under 304, not since July 2, '27.

Q. I see.

(Deposition of Richard B. Posey.)

A. He can't apply for reinstatement of term insurance any more; yearly renewable term, I should say.

Q. But could he apply for new insurance after that, in March, 1932, under Section 304?

A. No, sir; he could not apply for any insurance under 304 at that time unless he had a converted policy that had been lapsed for less than two years, and he could apply for reinstatement of such a policy.

Q. In order to apply for United States Government life insurance it was necessary for Thomas Joseph Kelley to have first had term insurance, was it not?

A. No. If he ever had the right to apply or had applied [31] or been granted yearly renewable term insurance, he had the right to apply for insurance under Section 310.

Q. It was necessary, then, first to determine whether he was eligible to have applied for war risk term insurance prior to May 29, 1928, in order for him to have been granted United States Government life insurance in 1932?

Mr. Becker: Objected to as irrelevant and immaterial.

A. Not in his case because I believe, yes, he had yearly renewable term insurance while in the service.

By Mr. Miller:

Q. But you had to check that fact?

A. Oh, yes.

(Deposition of Richard B. Posey.)

Q. Before granting his insurance?

A. We checked the fact that he was entitled to it.

Q. And in checking that, it was the policy to look at the card index to determine whether he had previously had a term policy? A. Yes.

Q. And this index card showed that he did previously have a term policy? A. He did.

Q. And what evidence is there on this application for reinstatement of March, 1932, which indicates that?

A. Well, on the first page of the application there is a notation "T 2015048," which is the term application number.

Q. And the index card which shows that T number also shows his C number, does it not?

A. Yes.

Q. Then, someone must have looked at that card and determined [32] mined that he had a C number before this application for insurance was approved?

Mr. Becker: Objected to as irrelevant and immaterial.

A. I feel they knew that he had a C number. It is on the application; it shows right on here (indicating).

By Mr. Miller:

Q. And that must have been put there before the application was approved under those circumstances, don't you think? A. I'd think it was.

Q. Now, Doctor, did the examination of Dr. Lenker, which appears on the third page of De-

(Deposition of Richard B. Posey.)

fendant's Exhibit 1, dated March 15, 1932, indicate any evidence of aortitis?

Mr. Becker: Objected to as irrelevant and immaterial, and the examination report which is in evidence speaks for itself and is the best evidence.

A. I can't find any answers that indicate he had any heart disability.

By Mr. Miller:

Q. Then, assuming the facts shown on the examination made by Dr. Lenker to be true, the applicant Kelley was then in good health, was he not?

A. I'd say yes, he was approved on that basis.

Q. Was there any evidence before the Veterans Administration at the time this application for insurance was approved which showed that this veteran knew he had had syphilis, or do you know?

Mr. Becker: Objected to.

A. I couldn't answer that question because I haven't had access to the other files. [33]

By Mr. Miller:

Q. Was there any evidence before the Veterans Administration at the time this application was approved that this veteran had knowledge of the fact that he had previously had aortitis, or do you know?

Mr. Becker: This question is objected to because it is asking this witness to testify as to the knowledge of the insured and asking him to express an opinion and to speculate.

A. I don't know.

Mr. Miller: That is all.

(Deposition of Richard B. Posey.)

Redirect Examination

By Mr. Becker:

Q. Just one more question, Mr. Posey. Under the practice of the Veterans Administration, had this insured at the time of his application stated that he was suffering from aortitis or had been suffering from aortitis and had in October, 1931, had a positive Wassermann, even with the examination of Dr. Lenker showing him to be a good risk and in good health at the time of his examination, could this insurance have been granted under the practice and procedure of the Veterans Administration without further inquiry to determine his true condition?

Mr. Miller: I object to the question, first, on the ground that this question is leading; second, that it is argumentative; third, that it is irrelevant, immaterial, and incompetent in that knowledge of these conditions on the part of the insured is essential in order to establish fraud, and the question does not embody that very important phase of this case; further for the reason that it calls for this witness, who has admittedly never himself approved an application for insurance, to testify [34] as to what some doctor or other person would do under a given state of circumstances; and for other reasons to be assigned at the trial of this case.

A. I would say that no one was authorized to approve an application where either the plus Wassermann test was shown or aortitis; but with both

(Deposition of Richard B. Posey.)

together, why, no one could possibly approve that kind of an application, under the law, as the law was interpreted by the Veterans Administration.

Mr. Becker: That is all.

Recross Examination

By Mr. Miller:

Q. And that interpretation for the Veterans Administration was by regulation?

A. No. At that time it was the determination of those in charge of approving the applications. There has since been given in regulation form, written form, a definition of good health, but it has in no way changed what has been in the minds of all the people who have had to do with this insurance in approving applications, that if they were not in good health we couldn't approve them, and that bound the doctors and everybody else.

Q. Then, your answer to the last question propounded by Government counsel was based upon what you thought was in the minds of the people who approved the applications, wasn't it, Mr. Posey?

A. From my knowledge of the general practice of approving and disapproving applications, with which I have been very familiar for a long number of years.

Q. At the time this application was approved on April 2, [35] 1932, then, there was no regulation issued by the Veterans Administration defining good health?

(Deposition of Richard B. Posey.)

A. I am not positive, Mr. Miller, as to the exact date when that definition came out. That may have been out at that time; I am not positive.

Q. The regulation itself would show?

A. The regulation would show, and I forget the number of it here. I could give you my version of what the definition is.

Q. Could you attach to and make a part of this *definition* a copy of the official regulation defining good health, allowing counsel to examine the same before it is attached?

A. Yes, I could do that. I can get it for you, Mr. Miller.

Mr. Miller: That is all.

RICHARD B. POSEY

Signature of Witness

Subscribed and sworn to this 16 day of May, A. D., 1941.

[Seal]

LLOYD L. HARKINS

Notary Public in and for the District of Columbia.

My Commission expires September 1, 1942. [36]

[DEFINITION OF GOOD HEALTH.]

[3155. The words "good health" when used in connection with insurance, mean that the applicant is, from clinical or other evidence, free from disease, injury, abnormality, infirmity, or residual of disease or injury to a degree that would tend to weaken or impair the normal functions of the mind or body or to shorten life.] (May 17, 1934.)

United States of America,
District of Columbia:

I, Lloyd L. Harkins, a notary public duly commissioned and qualified in and for the District of Columbia of the United States, aforesaid, do hereby certify that pursuant to the annexed and attached notice, in compliance with Sections 639, 640, and 641 of Title 28 of the United States Code, there came before me on the 15th day of May, A. D., 1941, at 10 o'clock a. m., in Room 304 Columbian Building, 416 Fifth Street, Northwest, Washington, D. C., on behalf of the defendant, the following named person, to wit, Richard B. Posey, who was by me duly sworn to testify the whole truth and nothing but the truth of his knowledge touching and concerning the matters in controversy in this cause, and that he was thereupon carefully examined, upon his oath, and his examination reduced to writing under my supervision, and that the deposition is a true record of the testimony given by the witness; and that the said witness read the same and subscribed his name hereto.

I further certify that I am neither attorney or counsel for nor related to or employed by any of the parties to the action in which this deposition is taken, and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

I further certify that, it being impracticable for me to deliver said deposition with my own hands into the court for which it was taken, I have re-

tained the same for the purpose of being sealed up and directed with my own hands and speedily and [37] safely transmitted to the said court for which it was taken, and to remain under my seal until there opened.

I further certify that the reasons for the taking of the deposition de bene esse of said witness are as stated in the notice of the taking thereof attached hereto, and made a part of this certificate; that the said notice given to the adverse party and the attendant papers and deposition are by me sealed up and directed to the Clerk of the District Court of the United States in and for the Southern District of California, Central Division, Los Angeles, California, and the same are by me enclosed in an envelope addressed and directed to the said court as aforesaid, duly and properly marked and identified, and said deposition forwarded herewith.

In witness whereof I have hereunto set my hand and affixed my notarial seal this 16 day of May, A. D., 1941.

[Seal]

LLOYD L. HARKINS

Notary Public in and for the District of Columbia.

My Commission expires September 1, 1942.

[Endorsed]: Filed May 20, 1941. [38]